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No. 80-951

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Petitioners,

v.

TRANS WORLD AIRLINES, INC.,
Respondent,

and

ANNE B. ZIPES, PATRICIA A. SANTINI, and PAMELA J. DAILING, individually and on behalf of a class,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WILLIAM A. JOLLEY
STEVEN A. FEHR
SCOTT A. RAISHER
1300 Traders Bank Building
1125 Grand Avenue
Kansas City, Missouri 64106
Tel: 816-474-1240

Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Where a court of appeals has determined that the district court has no subject matter jurisdiction over certain claims, does the district court nonetheless have jurisdiction:

a) to approve a settlement of those same jurisdictionally-defective claims;

b) order that plaintiffs (former employees) be awarded retroactive competitive seniority;

c) order that the provisions of the settlement supersede the collective bargaining agreement between the employer and the union representing the incumbent employees;

all of the above actions being taken over the objection of the collective bargaining representative (union) of such employees?

2. In an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, et. seq. by former employees solely against an employer, may a court, pursuant to a settlement of that action, over the objection of the union representing incumbent employees, and absent a finding under § 706(g) of any violation as to such former employees for which there is liability:

a) order that the provisions of the settlement supersede the collective bargaining agreement between the employer and the union by granting full retroactive seniority to those former employees?

b) grant full retroactive competitive seniority to those former employees under the standard enunciated by this Court in *Franks* v. *Bowman Transportation Company, Inc.*, 424 U.S. 747 (1976), where, as distinguished from *Franks*, the Court of Ap-

peals determined such claims to be without merit, and there has been no allegation or determination that the seniority system violates Title VII.

3. Is the remedy of rightful place competitive seniority appropriate:

a) when such relief results in such adverse impact on incumbent employees as, *inter alia*, the likelihood that hundreds of employees who either are now or soon will be on layoff, will never regain their employment and that other employees will be required, in order to retain employment, to relocate at their own expense to other cities;

b) when such relief will impair and dilute further the seniority rights of four distinct groups who themselves have been the victims of unremedied discrimination by the same employer?

PARTIES INVOLVED

Respondent Trans World Airlines, Inc. is a commercial air carrier and defendant in the proceedings below. The individual respondents are class representatives of the plaintiff class which has been divided into two subclasses by the district court. Petitioner Independent Flight Attendants is a labor union representing individuals employed by respondent TWA and was an intervenor in the action below.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, Independent Federation of Flight Attendants ("IFFA"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered June 13, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals has not yet been officially reported. It is unofficially reported at 23 FEP 118, and a copy appears in the Appendix at pp. 1a-10a. The three relevant orders of the district court have not been published but appear in the Appendix at pp. 13a-19a. This petition also involves a previous opinion by the Court of Appeals in this case which has been reported as *In re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F.2d 1142 (7th Cir. 1978), and this opinion appears in the Appendix at pp. 40a-58a. Two other opinions have issued from the Court of appeals during the history of this litigation, and they appear at 490 F.2d 636 and 455 F.2d 101. Previous opinions of the district court have been unofficially reported at 9 FEP 101; 12 FEP 1461; and 17 FEP 1512.

JURISDICTION

The judgment of the Court of Appeals was entered on June 13, 1980. A timely petition for rehearing was filed on June 25, 1980. The petition for rehearing was denied on September 17, 1980. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES, CONSTITUTIONAL PROVISIONS, AND RULES INVOLVED

This petition involves Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, specifically Section 703(h), 42 U.S.C. § 2000e-2(h); Section 706(d), 42 U.S.C. § 2000e-5(d) (1970); and Section 706(g), 42 U.S.C. § 2000e-5(g). It also involves Article III of the Constitution of the United States, and Rules 82 and 23(e) of the Federal Rules of Civil Procedure. The relevant portions of all of these provisions appear in the Appendix.

STATEMENT OF THE CASE

A. Background

Until October of 1970, respondent Trans World Airlines, Inc. (TWA) maintained a "no-motherhood" policy resulting in the termination of female flight attendants who became mothers. On May 30, 1970, a charge was filed with the Equal Employment Opportunity Commission (EEOC) challenging this practice. This was the first such charge filed. A class-action complaint was filed on August 18, 1970, in the United States District Court of the Northern District of Illinois, alleging that TWA's no-motherhood policy violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and invoking jurisdiction under the same statute. The purported class consisted of all flight attendants terminated on account of motherhood since July 2, 1965 (the effective date of the Act). One of the class representatives was the union then representing TWA's flight attendants, the Air Line Stewards and Stewardesses Association (ALSSA).

In 1971 the class representatives and TWA agreed upon a settlement, which provided, *inter alia*, for the rehiring of each class member with the same amount of seniority held at the time of her termination. The EEOC sought to intervene, presumably for the purposes of blocking the proposed settlement. The district court refused to allow intervention, and the Seventh Circuit affirmed. *ALSSA* v. *American Airlines*, 455 F.2d 101 (7th Cir. 1972).[1]

The district court subsequently approved the settlement. In support of the settlement, counsel for the class, who was also counsel for ALSSA, testified that a major reason for agreeing to the settlement was that most of

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[1] For several years this case was consolidated with a similar suit against American Airlines.

the class faced a serious legal obstacle to any recovery because they were terminated long before any charge had been filed with the EEOC and had not complied with the Title VII time limits.[2]

Several disenchanted class members appealed. The Seventh Circuit reversed the approval of the settlement because of a conflict it perceived between ALSSA's obligations to the class and to the then-current working flight attendants. The court also directed the ALSSA be replaced as a class representative. *ALSSA* v. *American Airlines*, 490 F.2d 636 (7th Cir. 1973), *cert. den.* 416 U.S. 993 (1974).

Upon remand, the case proceeded on the merits.[3] In 1976 the district court granted summary judgment in favor of the plaintiffs on the issue of liability. *See, In re Consolidated Pretrial Proceedings in the Airline Cases*, 17 FEP 1512 (N.D.Ill. 1976). Judge McGarr found that the "no-motherhood" policy was discriminatory and that the Title VII time limits did not bar the claims of any class members. An interlocutory appeal was taken from this ruling. During the pendency of that appeal (on April 1, 1977), petitioner herein, the independent Federation of Flight Attendants (IFFA) came into existence

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[2] See, 490 F.2d at 639-640.

[3] On July 22, 1974, another class action was filed on behalf of the same class against TWA and ALSSA. The second suit alleged that the acts of TWA and ALSSA in negotiating the attempted settlement of the first action violated Title VII. The second suit was consolidated with the first action for discovery purposes and has remained quiescent since that time. To this date no rulings have been made on any of the legal issues raised by the second suit; and it has not been mentioned by either the district court or the Seventh Circuit during the events which led to the filing of this *certiorari* petition. Thus, while this explains why many documents from the lower courts are double-captioned, we need not mention the "second suit" again.

and under Railway Labor Act election procedures became the new collective bargaining representative for TWA flight attendants.

In August of 1978 the Seventh Circuit reversed the district court again. *See, In re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F.2d 1142 (7th Cir. 1978).[4] *The Court of Appeals held that the claims of approximately 92% of the purported class are jurisdictionally barred.*[5] These individuals were terminated more than ninety days prior to May 30, 1970, the filing date of the first EEOC charge, and hence could not comply with the time limits in 42 U.S.C. § 2000e-5(d) (1970).[6] The Seventh Circuit concluded that the Title VII time limits are jurisdictional prerequisites which could not be waived, and thus, that there was no subject matter jurisdiction over the claims of the vast majority of the plaintiff-class. Counsel for the class had argued that TWA had waived its time limits defense pursuant to the aborted 1972 settlement agreement. The Seventh Circuit disposed of this argument by stating that since the time limits were jurisdictional prerequisites, they could not be waived pursuant to a settlement. *See*, 582 F.2d at 1151, App. 57a.

After the 1978 Seventh Circuit opinion plaintiffs filed a *certiorari* petition with this Court. *See, Zipes, et al* v. *Trans World Airlines, Inc.*, No. 78-1545. TWA then cross-petitioned. *See, Trans World Airlines, Inc.* v. *Zipes, et al.*, No. 78-1549. The parties thereafter moved to defer consideration of their *certiorari* petitions in order to negotiate a new settlement. This request was granted by the

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[4] We will refer to this opinion as the *"Consolidated"* opinion. It is reproduced in our Appendix at App. 40a.

[5] All the class representatives were included among the group whose claims are jurisdictionally barred.

[6] The time period is now 180 days. See, 42 U.S.C. § 2000e-5(e).

Court on June 4, 1979, and accordingly those *certiorari* petitions are still pending.

Plaintiffs and TWA reached a new settlement. It establishes two "sub-classes": Sub-Class A, consisting of those individuals whose claims are valid according to the *Consolidated* opinion; and Sub-Class B consisting exclusively of those individuals whose claims are jurisdictionally defective. This settlement requires TWA to pay the sum of three million dollars to the plaintiff class; half to be divided among the members of Sub-Class A and half among the members of Sub-Class B. There are approximately 30 women in Sub-Class A, and 400 women in Sub-Class B.[7] The settlement agreement also requires TWA to offer re-employment to *all* plaintiffs. On the question of retroactive competitive seniority for the returning class members, the settlement agreement provides that the district court "in its discretion, pursuant to the provisions of Section 706(g), and all other applicable provisions of law . . ."[8] will determine what, if any, seniority plaintiffs receive.

The settlement agreement purports to override past, present, and future collective bargaining agreements. (XIII, EXCLUSIVITY, App. 36a). The provisions in the settlement regarding determination of seniority are directly contrary to provisions of the current TWA-IFFA collective bargaining agreement. *See* App. 62a.

Upon learning of the new settlement agreement and the resulting likelihood that the agreement, if approved, would cause the return of hundreds of women to the bargaining unit with great amounts of retroactive com-

[7] Thus, pursuant to the new settlement agreements each of the members of Sub-Class B would receive approximately $3,750 (minus costs and attorneys fees) plus the offer of reinstatement with retroactive competitive seniority ranging from ten to thirty years.

[8] The settlement agreement is in the Appendix at App. 23a.

petitive seniority, the current union and petitioner herein, IFFA, intervened and objected to the settlement.

Before the district court, IFFA argued, *inter alia*, that (1) the district court had no subject matter jurisdiction to approve the settlement and grant retroactive competitive seniority since the Seventh Circuit had already determined that there was no subject matter jurisdiction over the claims of the members of Sub-Class B; (2) the settlement agreement could not override the collective bargaining agreement between IFFA and TWA; and (3) under these circumstances the court could not grant retroactive seniority to all plaintiffs.

The district court overruled IFFA's jurisdictional challenge on the grounds that the Seventh Circuit's opinion was not final and therefore was not binding. An evidentiary hearing subsequently was held on the question of impact of the settlement upon the current bargaining unit members. A few weeks after the hearing, the district court signed form orders provided by counsel for the class and counsel for TWA. The orders directed that all members of both Sub-Classes be offered reinstatement with full retroactive competitive seniority, and found that such seniority would not cause unusual adverse impact.

B. The Decision Of The Court Of Appeals

IFFA appealed, but the Seventh Circuit affirmed in an opinion delivered June 13, 1980. (The opinion is attached at App. 1a). Regarding the jurisdictional issue, the Seventh Circuit held that despite its previous ruling regarding the lack of subject matter jurisdiction, the district court nonetheless had jurisdiction to approve a class action settlement and to grant seniority pursuant to that settlement over the objections of IFFA. The court reasoned (1) that the principles favoring settlement required this result; (2) that parties should not be "forced to litigate" a contested issue of subject matter jurisdic-

tion; and (3) that the parties' agreement that the court had jurisdiction for purposes of approving the settlement and granting seniority despite objections of incumbent employees and the union was not "tantamount to an attempt to confer subject matter jurisdiction by consent." App. 8a.

The Seventh Circuit did acknowledge that its opinion was contrary to the holding in *McArthur* v. *Southern Airways, Inc.*, 569 F.2d 276 (5th Cir. 1978). Indeed, before releasing its opinion, the panel which heard the case circulated a draft among all judges on the Seventh Circuit pursuant to a local rule applicable to decisions which will create a conflict with another circuit.[9]

Regarding the propriety of a grant of seniority contrary to the provisions of the collective bargaining agreement, the Seventh Circuit simply said that the district court had not abused its "discretion" and cited *Franks* v. *Bowman Transportation Co., Inc.*, 424 U.S. 747 (1976). The court further noted that based upon normal hiring rates described in the deposition of TWA Vice President Crombie, TWA would likely be able to absorb all returning class members in less than a year. TWA Vice President Crombie had testified that in a "normal" year, the airline hires between 400-800 flight attendants. However, in the 18 months since this settlement agreement was reached, more than 400 of the active, incumbent flight attendants have been placed on furlough, and no new flight attendants have been hired.[10] Under the terms of the settlement agreement, as interpreted by Mr. Crombie in that same deposition, if and when vacancies arise, returning class members will receive preference because

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[9] See Seventh Circuit Rule 16(e), App. 61a.

[10] Only part of the facts alleged in this sentence appear in the record, since a major furlough has occurred since the case was presented to the Court of Appeals. We are confident, however, that respondent TWA will stipulate to the accuracy of our statement.

of their greater seniority over any bargaining unit members who are on furlough.

REASONS FOR GRANTING THE WRIT

I. THE LACK OF JURISDICTION PRECLUDES THE ACTION TAKEN BY THE DISTRICT COURT.

A. Importance Of The Issue.

This case presents a classic issue regarding the limited subject matter jurisdiction of the federal courts. The Seventh Circuit first held that there was no subject matter jurisdiction over the claims of more than 92% of the putative class. Later, however, it ruled that the district court nonetheless could approve settlement of those claims and pursuant to that approval grant relief in the form of retroactive competitive seniority to all plaintiffs over the objection of the union representing the incumbent employees and in violation of the collective bargaining agreement between the union and the defendant company.[11] The rationale of the decision is that the finding of no subject matter jurisdiction conceivably could be reversed by the Supreme Court and that the parties should not be "forced against their will" to present the jurisdictional issue before this Court.

Thus, the opinion below holds that judicial policies favoring settlement can allow a court to ignore a lack of subject matter jurisdiction. The court said:

> We do not share the view, under the circumstances of this case, that the parties' agreement is tantamount to an attempt to confer subject matter jurisdiction by consent. (App. 8a).

* * * *

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[11] Our jurisdictional challenge, of course, relates only to Sub-Class B. The district court could approve settlement of Sub-Class A claims only. See Sub-Section D, *infra*.

> We think the principles favoring settlement of class action lawsuits remain the same regardless of whether the disputed legal issues center on the jurisdiction of the court over the action. Where, as here, the jurisdictional question is not settled with finality, parties should not be forced to litigate the issue of jurisdiction if they can arrive at a settlement that is otherwise appropriate for district court approval. (App. 9a).

The Seventh Circuit has held that a district court can exercise jurisdiction even though its court of appeals found that there is no jurisdiction because the Supreme Court could hold that the court of appeals is wrong. We find such reasoning to be peculiar and circular at best. More importantly, it runs directly contrary to the historical principle that federal courts are courts of limited jurisdiction.

The importance of this issue goes to the very core of our federal judicial system. Indeed, the principle of limited jurisdiction of the federal courts is, in the words of Professor Wright, one of "first importance."[12] It evolves not from judicial policies (such as the "policy" favoring settlements), but from Article III of the Constitution. The Seventh Circuit's opinion, if allowed to stand, carves a new and dramatic exception to this principle.

B. There Is An Acknowledged Conflict Among Circuits.

The Seventh Circuit acknowledged (App. 9a) that it disagreed with the Fifth Circuit in *McArthur* v. *Southern Airways*, 569 F.2d 276 (5th Cir. 1978) (en banc). *McArthur* involved the district court's approval of a settlement between *Southern Airways* and female flight attendants who alleged that the airline violated Title VII by forbidding the employment of married flight at-

[12] C. A. Wright, *Law of Federal Courts*, § 7 (West Pub. 3rd Ed. 1976).

tendants. Subsequent to the settlement approval, the decision issued in *United Airlines* v. *Evans*, 431 U.S. 553 (1977), which held that "[a] discriminatory act which is not made the basis for a timely charge . . . has no legal consequences" and does not create a continuing violation unless a present violation exists. 431 U.S. at 558.

Upon reading *Evans*, the Fifth Circuit, acting *sua sponte*, found that the district court had no subject matter jurisdiction over the plaintiffs' claims, reversed the settlement approval and dismissed the action.

The conflict between the Fifth and Seventh Circuits is deep, direct, and irreconcilable. Indeed, the Fifth Circuit clearly assumed that it was so obvious that a court which had determined it was lacking subject matter jurisdiction could not approve a settlement that it was not necessary to discuss the issue in any detail. Moreover, in *McArthur*, the determination of lack of jurisdiction came long *after* the approval of the settlement by the district court. The Fifth Circuit still felt compelled to reverse and dismiss due to its perception of a lack of jurisdiction. Here, the Seventh Circuit determined that jurisdiction was lacking prior to the time the parties reached the settlement. Thereafter the parties asked the district court for approval and for an award of seniority. The Seventh Circuit affirmed despite its unchanged finding that jurisdiction was lacking. The Court should grant *certiorari* to resolve this acknowledged conflict between circuits regarding an important issue of subject matter jurisdiction.

C. The Decision Below Has Allowed The Parties To Confer Jurisdiction By Consent Contrary To The Principle Of Limited Subject Matter Jurisdiction.

The Fifth Circuit's decision in *McArthur* is in complete accord with the entire body of case law regarding

subject matter jurisdiction. The Seventh Circuit opinion in this case, by contrast, departs radically from the same legion of cases, and warrants review by this Court. It is hornbook law that parties cannot confer upon a federal court jurisdiction that has not been conferred by the Constitution and Congress. Jurisdiction cannot be provided by stipulation, consent, waiver, or conduct by the parties. *Mitchell* v. *Maurer*, 293 U.S. 237 (1934); *American Fire and Casualty Co.* v. *Finn*, 341 U.S. 6 (1951);[13] *Sosna* v. *State of Iowa*, 419 U.S. 393 (1975). A court, whether trial or appellate, is obliged to inquire *sua sponte* into the jurisdiction of the district court, and to dismiss any claim once it is determined that the court lacks jurisdiction over it. *Mitchell* v. *Maurer*, *supra*; *City of Kenosha, Wisconsin* v. *Bruno*, 412 U.S. 507 (1973). The requirement of dismissal immediately following a determination of lack of jurisdiction also is built into Rule 12(h)(3) of the Federal Rules of Civil Procedure. Simply put, the law is that "the subject matter jurisdiction of the federal courts is too basic a concern to the judicial system to be left to the whims and tactical concerns of the litigants."[14] But it has been so left here.

Prior to the issuance of the opinion from which we petition, there was also no doubt that the concepts of subject matter jurisdiction outlined above also applied to court approval of any consent decrees and/or settlements (class action or otherwise). *See, United States* v. *Boe*, 543 F.2d 151, 157-158 (C.C.P.A. 1976); *Patterson* v. *Stovall*, 528 F.2d 108, 112, n.5 (7th Cir. 1976);

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[13] We could, of course, cite hundreds of other decisions standing for the principles we discuss here and do not only due to lack of space. We refer the Court generally to the cases cited in 13 Wright, Miller and Cooper, *Federal Practice and Procedure*, § 3522, n. 6-12 (West Pub. 1975).

[14] Wright, Miller and Cooper, supra, § 3522.

Fairfax Countrywide Citizens v. *Fairfax County*, 571 F.2d 1299 (4th Cir. 1978), *cert. den.*, 439 U.S. 1047 (1978); *Jamison* v. *Butcher & Sherrerd*, 68 F.R.D. 479 (E.D. Pa. 1975). In *Patterson*, which was an appeal to the approval of a class action settlement, the Seventh Circuit noted that pursuant to the settlement the defendants had withdrawn their challenge to the court's subject matter jurisdiction but said that, "Despite the withdrawal, the District Court would have no authority to approve the settlement had it lacked jurisdiction." Curiously, *Patterson* was cited with approval in the Seventh Circuit opinion in this case, with no explanation as to how this case requires a different result despite the obvious fact that in *Patterson* the parties had "settled" subject matter jurisdiction just as have the parties here. But there is more. In its prior opinion in this very case the Seventh Circuit held that a settlement could not obviate a lack of subject matter jurisdiction. The plaintiffs argued that TWA had waived its jurisdictional defense pursuant to the aborted 1972 settlement. The Seventh Circuit quickly dismissed this argument, stating:

> Although it is questionable whether any concessions made at a settlement hearing should be held to constitute a waiver when the settlement is subsequently overturned, we need not reach this question as our conclusion that this filing requirement was jurisdictional precludes a finding of waiver. *Consolidated*, *supra*, 582 F.2d at 1151, App. 57a.

Thus, one Seventh Circuit opinion in this case has held that the defendant and alleged wrongdoer cannot waive subject matter jurisdiction pursuant to a settlement agreement. Another has held that innocent third parties to a settlement agreement which violates their rights cannot raise the court's lack of jurisdiction. We respectfully submit that such reasoning is illogical, inequitable and incorrect.

The conclusion that the settlement was not tantamount to conferring jurisdiction by consent is plainly wrong. Consider the course of events: the Seventh Circuit had determined that there was no jurisdiction over hundreds of claims; the parties then agreed upon a settlement over those claims which they asked the district court to approve; pursuant to the settlement they purported to vest in the district court the power, indeed, the jurisdiction to determine and grant seniority to all those individuals whose claims are jurisdictionally barred.

A settlement is, after all, an agreement and a stipulation. Pursuant to this settlement, the parties agreed that the court could issue orders relating to seniority which it otherwise could not because of the prior judicial determination that jurisdiction is lacking. Thus, the only basis for the court's jurisdiction was the consent of the parties.

The remainder of the Seventh Circuit rationale also dissolves because it is not the settlement which has granted seniority, it is the order of the court. *The parties do not need the court to settle; they need the court to grant seniority and supersede the collective bargaining agreement.* Settlement without the court and the Rule 23(e) approval procedures might be more difficult, but it certainly is not impossible. If each plaintiff can be expected to sign a release and endorse a settlement check, surely each plaintiff can be asked to sign an individual settlement agreement. But absent an order of the court, or the consent of the union, plaintiffs cannot obtain a grant of seniority, and that is precisely the point. The parties are not being "forced" to litigate. Instead they are simply faced with a choice of (1) proceeding with this litigation to its conclusion, or (2) settling without infringing upon the seniority rights of innocent incumbent employees.

Perhaps the final absurdity of the two Seventh Circuit opinions is that *Consolidated* is still being cited by

the Seventh Circuit to limit class actions, [*McDonald* v. *United Air Lines, Inc.*, 587 F.2d 357 (7th Cir. 1978), *cert. den.*, 442 U.S. 934 (1979)]; and, to *sua sponte* dismiss claims on appeal for lack of jurisdiction [*Gaballah* v. *Johnson*, —— F.2d ——, 23 FEP 46, 52, n. 11 (7th Cir. 1980)]. Judge Fairchild, who authored the opinion in this case also wrote *Gaballah*, which issued only four days after the decision here. It seems incredible that an opinion in this case can cause dismissal of claims for lack of jurisdiction and preclude settlements in other cases, but not in this case. But that is what has happened.

D. The Seventh Circuit's Decision Is Contrary To This Court's Decisions In Zahn And Snyder.

The Seventh Circuit's opinion stated that this case "may" be distinguishable from the Fifth Circuit in *McArthur*, *supra*, because here the district court had jurisdiction over the claims of individuals numbering about 8% of the putative class, whereas in *McArthur* the claims of all plaintiffs were jurisdictionally defective. This distinction which the court apparently thought about, but declined to make, is in fact without merit under well-established Supreme Court precedent. *Snyder* v. *Harris*, 394 U.S. 332 (1969); *Zahn* v. *International Paper Company*, 414 U.S. 291 (1973). Those cases firmly establish that in a class action under Rule 23 F.R.Civ.P., the court must have jurisdiction over the claim of *each* plaintiff. See also Rule 82 which provides that the Federal Rules of Civil Procedure shall not be construed to extend the jurisdiction of the federal courts. Simply put, the essence of Rule 23 is to provide a procedural mechanism for litigation of claims over which the court has jurisdiction; it does not create jurisdiction.

Thus, jurisdiction over the claims of sub-Class A cannot provide the necessary jurisdiction to allow a court to approve settlement of the claims of Sub-Class B, or to

order that Sub-Class B members be reinstated with retroactive competitive seniority. Such a theory would be a clear violation of the unambiguous statement in *Zahn* that "one plaintiff may not ride in on another's coattails." 414 U.S. at 301. This is precisely the logic the Seventh Circuit applied in *Consolidated* when it directed that the jurisdictionally barred plaintiffs be dismissed. Indeed, clearly if Sub-Class A could provide jurisdiction for Sub-Class B for purposes of settlement approval, it could also provide jurisdiction for the merits of the claims of Sub-Class B.

But what the opinion below has done is to allow a perceived necessity to approve a settlement under Rule 23(e) to take precedence over an unchanged finding of lack of jurisdiction. Insofar as the jurisdiction of the court is concerned, there is no conceivable basis for distinguishing between Rule 23(e) regarding class action settlement approval and the remainder of the Rule regarding maintenance of class actions. Accordingly, the effect of the decision is to allow Rule 23(e) to expand jurisdiction, a result forbidden by the Rules, the case law, and the Constitution. This conflict presents another strong reason why *certiorari* should be granted.

E. In Any Event, The Underlying Jurisdictional Question Is Controlled By Evans.

As discussed above, having found that there was no subject matter jurisdiction over Sub-Class B, the Seventh Circuit was obliged to dismiss those claims and direct the district court not to proceed further. The Seventh Circuit has violated this duty by allowing the district court to approve the settlement and grant seniority. This alone, requires a summary reversal. But there is another, equally simple manner for disposing of this case. This Court, like the Court of Appeals, has the obligation to inquire into the question of the district court's jurisdiction, and if it agrees with the Court of Appeals that ju-

risdiction is lacking, *this* Court must order dismissal of those claims.

We do not believe that there is any real dispute over the nature of the Title VII time limits; this Court has referred to them as jurisdictional prerequisites on several occasions. *See, McDonnell-Douglass Corp.* v. *Green*, 411 U.S. 792, 798 (1973); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974); *Evans, supra*, 431 U.S. at 557, n.9. These precedents led the Fifth Circuit in *McArthur* and the Seventh Circuit in *Consolidated* to easily reach the results there. *See also, Hinton* v. *CPC International, Inc.*, 520 F.2d 1312 (8th Cir. 1975); *Wetzel* v. *Liberty Mutual Insurance Co.*, 508 F.2d 239 (3rd Cir. 1975), *cert. den.* 421 U.S. 1011 (1975). We recognize that at least two circuits have stated that this Court did not mean what it said when it referred to the time limits as jurisdictional. *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429 (D.C. Cir. 1976), *cert. den.*, 434 U.S. 1086 (1978); *Hart* v. *J. T. Baker Chemical Corp.*, 598 F.2d 829 (3rd Cir. 1979). We note, however, that the decision in *Laffey* was pre-*Evans*, and, also, that the decision in *Hart* may be in conflict with the Third Circuit's own decision in *Wetzel*. Moreover, the issue of jurisdiction also did not control the decision in *Hart*, since there the court held that jurisdictional or not, the time limits required dismissal.

Clearly, IFFA has standing to raise this issue because the district court has exercised jurisdiction to override IFFA's collective bargaining agreement and to alter the legitimtate seniority rights of its members. Indeed, pursuant to this settlement TWA is, in effect, asking IFFA's membership to bear the burden of the slight risk that the Seventh Circuit is wrong and that the time limits are not jurisdictional. Under these peculiar circumstances, the time is ripe for this Court to remove whatever doubt may remain regarding the jurisdictional nature of the

Title VII time filing requirements, and any questions regarding the meaning of this Court's decision in *Evans*.

II. ABSENT A FINDING OF A VIOLATION UNDER § 706(g) OF TITLE VII, IT IS IMPROPER TO AWARD RETROACTIVE SENIORITY OR SUPERSEDE THE COLLECTIVE BARGAINING AGREEMENT.

In *Franks* v. *Bowman Transportation Company*, *supra*, this Court established, as a "generally appropriate" remedy for discrimination a grant of retroactive seniority to disadvantaged employees and former employees, absent an unusual adverse impact on incumbent employees from circumstances not generally found in Title VII cases. 424 U.S. at 779, n. 41. Unlike this case, in *Franks* there had been a fully-litigated determination that the employer had violated Title VII and also that the collective bargaining agreement perpetrated that discrimination. 424 U.S. at 751. In *United Air Lines* v. *Evans*, *supra*, this Court noted the limited scope of *Franks*, stating:

> Our decision is *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, does not control this case. *In Franks we held that retroactive seniority was an appropriate remedy to be awarded* under § 706(g) of Title VII, 42 U.S.C. § 2000e-5(g) *after an illegal discriminatory act or practice had been proved*, id. at 762-768. When that case reached this Court, the issues relating to the timeliness of the charge and the violation of Title VII had already been decided; we dealt only with a question of remedy. (431 U.S. at 558, 559, emphasis supplied, footnotes omitted).

There is certainly nothing very remarkable in the notion that *Franks* applies only to successful litigants; it follows from the emphasis placed upon the fact that the plaintiffs had "carried their burden." 424 U.S. at 772. That burden has not been carried by plaintiffs who settle, especially plaintiffs who settled after an

appellate court said that their claims are without merit.[15] More importantly, this result flows directly from the clear language of the statute itself. The remedial powers of the district court under § 706(g), 42 U.S.C. § 2000e-5(g), are triggered only "If the court *finds* that the respondent has . . . engaged . . . in an unlawful employment practice." (Emphasis supplied). At the time of settlement, the only finding in effect as to the claims of Sub-Class B was that they are barred by the failure to comply with the jurisdictional time limits.

Despite *Evans*, and despite § 706(g), the opinion below applies the *Franks* standard to a settlement, where, as to Sub-Class B, a violation has been neither admitted nor proven. The issue of whether a § 706(g) finding is a prerequisite to a grant of seniority is of paramount importance; and, as we will discuss below, there exists an irreconcilable conflict among the circuits. This uncertainty in the law, impacting upon incumbent employees throughout this nation, warrants resolution by this Court.

A. The Importance Of The Issue.

1. *The Interaction Between Title VII And Federal Labor Statutes.*

In the development of the remedial scheme of Title VII in the seniority area, both Congress[16] and this Court have consistently recognized the unique status of collective bargaining as being at the core of our national labor policy;[17] the special treatment afforded seniority

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[15] Our arguments here apply only to Sub-Class B.

[16] See discussion of Congressional record in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 350-352, (1977); and *Franks*, *supra*, 424 U.S. at 759-762.

[17] *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 78-79 (1977).

systems under Title VII itself;[18] and the primary role of the collective bargaining representative, superseding that of minority groups, in the resolution of the many complex problems in the workplace, including discrimination.[19]

Thus, within the last six years, this Court has determined that a neutral seniority system, perpetuating either pre-Act discrimination[20] or post-Act discrimination where no timely charge has been filed pursuant to Sec. 706(d),[21] does not give way to the need for remedy of such discrimination; and that a neutral seniority provision not designed to discriminate is immune from attack or modification under § 703(h), 42 U.S.C. 2000e-2(h).[22] In these decisions involving the interaction between Title VII and federal labor laws (the National Labor Relations Act and the Railway Labor Act),[23] this Court has continually recognized the primacy of collective bargaining. In *Franks*, the Court determined that seniority systems protecting non-victims of discrimination should give way, but only *where a violation of Title VII had been established* and where the seniority system negotiated by the union perpetrated that discrimination.

A logical extension of this line of cases came only last year, in *United Steelworkers* v. *Weber*, 443 U.S. 193

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[18] *Hardison, ibid.* 432 at 81, 82, citing Sec. 703(h), 42 U.S.C. § 2000e-2(h).

[19] *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50 (1975).

[20] *Teamsters, supra.*

[21] *Evans, supra.*

[22] *Hardison, supra.*

[23] In *Teamsters*, the employer and union operated under the provisions of the NLRA, 29 U.S.C. § 151, *et seq.* In *Evans* and *Hardison*, like the instant case, the collective bargaining relationship is governed by the RLA, 45 U.S.C. § 151, *et seq.*

(1979). In *Weber*, even though no violation of Title VII has been judicially established, this Court allowed the Union and employer to voluntarily change the seniority structure, at least temporarily until the effects of past discrimination had been remedied. There the union representing non-victims negotiated and consented to the contractual modifications. Thus, *Weber* keeps intact the essence of *Emporium Capwell* by holding that what cannot be done without the consent of the union can be done with the union's agreement. We note, however, that in *Weber*, despite the consent of the union, Justice Blackmun, in his concurring opinion, still felt compelled to state that the action approved there did not "involve the abrogation of pre-existing seniority rights." 443 U.S. at 215. The opposite is true here.

2. *The Decision Below Upsets The Balance Between Title VII And The Federal Labor Laws.*

Here, unlike *Franks*, no violation of Title VII by seniority system or otherwise has been established and, unlike *Weber*, the union has not consented to intrusion into present employees' seniority rights. The district court nonetheless ordered that the settlement agreement supersede the collective bargaining agreement and that plaintiffs be granted retroactive seniority.[24] The result reached is a significant departure from the principles established by the Court in the cases discussed above.

The unfairness of that result is readily apparent. Unlike payment of money by a party who has violated the law, the burden for a grant of seniority falls squarely upon innocent employees who never discriminated against anyone. *Meadows* v. *Ford Motor Co.*, 510 F.2d 939, 949 (6th Cir. 1975). See also the opinion of Chief Justice

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[24] The collective bargaining agreement seniority provisions bear a striking similarity to those in *Evans*, *supra*. See, 431 U.S. at 555, n. 6, and the excerpts from the agreement here (App. 62a).

Burger concurring in part and dissenting in part in *Franks*, 424 U.S. at 780. *Franks* does speak of a necessary "sharing of the burden" (424 U.S. at 777), but here the burden falls disproportionately upon innocent incumbent employees who are asked to move over in favor of individuals who cannot prove violations of Title VII entitling them to any rightful place to which they should be allowed to return. Indeed, under this settlement the alleged wrongdoer pays only a tiny fraction of what its ultimate liability would be if plaintiffs succeeded, whereas innocent incumbent employees suffer as much as if plaintiffs finally had prevailed on the merits.

The result of the decision below also perverts the principles enunciated in *Regents of the University of California* v. *Bakke*, 438 U.S. 265 (1978):

> We have never approved a classification that aids persons perceived as members of relatively victimized groups *at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations* . . . .
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> . . . Also, the remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit. *Without such findings of constitutional or statutory violations it cannot be said that the government has any greater interest in helping one individual than in refraining from helping another.* Thus, the government has no compelling justification for inflicting such harm. (438 U.S. at 307-309, citations and footnote omitted).

See also, Hardison, supra, 432 U.S. at 79, n. 12.

B. There Is A Conflict Among The Circuits.

The Seventh Circuit first faced the problem of subordinating seniority rights in settlements in *ALSSA* v.

American Airlines, 573 F.2d 960 (7th Cir. 1978), *cert. den.* 439 U.S. 876 (1978) (this case is referred to as "*American II*" in the Seventh Circuit opinion in this case). The court upheld a grant of seniority there but cautioned that it would not always be available pursuant to a settlement. See 573 F.2d at 964, n.9. *American II* appeared to set up a sliding scale, case-by-case approach to the applicability of *Franks* to a settlement; plaintiffs there were awarded seniority because they had virtually "earned through full litigation" the *Franks* remedy. In this case, however, Sub-Class B virtually had lost everything through full litigation, and accordingly IFFA argued below that even under *American II* seniority was not appropriate. The Seventh Circuit, however, refused to discuss its own sliding scale *American II* approach, and tersely said that seniority was appropriate, concluding with a quotation from *Franks*. Thus, it appears now that in the Seventh Circuit, Title VII plaintiffs and an employer-defendant may reach a settlement which grants the plaintiffs retroactive competitive seniority, and the union and the incumbent employees are helpless to prevent the concomitant abrogation of their collective bargaining agreement and legitimate seniority rights unless they can demonstrate the "unusual adverse impact" alluded to in *Franks*. The Seventh Circuit is in square and irreconcilable conflict with the Fifth Circuit's view as expressed in at least three cases: *Myers* v. *Gilman Paper Corp.*, 544 F.2d 837, modified 556 F.2d 758 (5th Cir. 1977), *cert. denied* 434 U.S. 801 (1977); *Southbridge Plastics Division, W. R. Grace and Company* v. *Local 759*, 565 F.2d 913 (5th Cir. 1978); and *High* v. *Braniff*, 592 F.2d 1330 (5th Cir. 1979).

In *Myers*, the court was faced with the issue of whether a Title VII settlement between a small group of employees and an employer could supersede a collective bargaining agreement between the employer and a union. The court held that it could not, stating that before a

court can grant any relief in a Title VII suit it first must find a violation. Similarly, in *Southbridge*, the Fifth Circuit held that a conciliation agreement between the EEOC and the employer could not override the union's rights under the collective bargaining agreement, since the Company and EEOC had not shown that the seniority system violated Title VII. In *High*, only a small portion of a massive consent decree between the plaintiff-class and the employer was challenged, and again the collective bargaining agreement prevailed. Regarding the portion of the consent decree which ran contrary to the collective bargaining agreement, the court said:

> [t]his portion of the decree lacks the factual underpinnings necessary for its survival as the independent judgment of the court. It was, in fact, a non-censentual consent decree. As such, it cannot stand. 592 F.2d at 1335.

It is clear that in the Fifth Circuit, pursuant to a Title VII settlement between an employer and plaintiff-employees (or would-be employees), a district court can not supersede a collective bargaining agreement and grant seniority to the plaintiffs absent the consent of the union or a fully-litigated judicial determination that discrimination has occurred which requires such action. It is equally clear that in the Seventh Circuit, once the plaintiffs and the employer-defendant have reached a settlement, the union and the incumbent employees are placed in precisely the same position they would be in if the plaintiffs had prevailed on the merits after full litigation. We also call the court's attention to *U.S.* v. *Roadway Express, Inc.*, 457 F.2d 854 (6th Cir. 1972); and *EEOC* v. *AT&T*, 556 F.2d 167 (3rd Cir. 1977), *cert. den.* 438 U.S. 915 (1978). These cases appear to take somewhat of a middle ground between the Fifth and Seventh Circuit positions. *AT&T* is distinguishable since there was no infringement upon competitive seniority and

no clear override of a collective bargaining agreement; it can, however, be read to say that *Franks* may apply even when there is no § 706(g) finding. However, yet another circuit has added the following in an opinion reversing the approval of a class action Title VII settlement:

> The duty of the district court to render a decree which will as far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future, arises only after a judicial determination of discrimination. A court asked to approve a compensation procedure established pursuant to a consent decree in which discrimination is neither admitted or proven is in a fundamentally different position.

U.S. v. *Trucking Employers, Inc.*, 561 F.2d 313, 317, n. 13 (D.C. Cir. 1977). Unfortunately, the court did not say precisely what that "fundamentally different position" is.

Thus, in the four years since *Franks*, at least four[25] circuits have considered rights of a union and incumbent employees pursuant to a Title VII settlement between certain or former employees and an employer. They have reached varying results, and the views of two particular circuits are diametrically opposed. These decisions from the circuits turn not only upon *Franks*, but upon interpretation of other recent cases decided by this Court, such as *Teamsters*, *Evans*, *Weber*, *Hardison* and *Emporium Capwell*. It is therefore appropriate for this Court to exercise its supervisory responsibility and clarify the rights of unions and incumbent employees under Title VII settlements to which they are not parties, and reconcile these rights to the Congressional mandate contained in § 706(g) and § 703(h).

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[25] *Roadway Express* was decided before *Franks*.

C. The Decision Below Is Contrary To Evans.

Once again, just as we stated in our discussion of the jurisdictional issue, we believe this Court's opinion in *Evans* controls this issue and requires reversal. The relevant holdings in *Evans* are threefold:

1) A discriminatory act not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed, and can be treated as lawful;

2) Absent the timely filing of a charge, the court does not even reach the remedy issue;

3) A challenge to a neutral "seniority system may not be predicated on the mere fact that a past event having no legal significance has affected the calculations of seniority credit, even if the past event might at one time have justified a valid claim against the employer. A *contrary view would substitute a claim for seniority credit for almost every claim which is barred by limitations. Such a result would contravene the mandate of § 703(h).*" (431 U.S. at 560, emphasis supplied).

Here, no timely charge was filed for Sub-Class B yet the Court bootstrapped the "remedy" question to the settlement, and integrated hundreds of individuals who did not file timely charges into a neutral seniority structure to the detriment of present employees. The fact that the decision here involves a settlement does not diminish the rule in *Evans*. The grant of seniority comes not from the settlement, but from the order of the district court, which was vested with the authority under the settlement to issue orders pursuant to "all applicable provisions of law." The principles of *Evans* are "applicable", and prohibit the result reached here.

III. THIS PETITION RAISES AN IMPORTANT QUESTION AS TO THE APPROPRIATENESS OF RIGHTFUL PLACE COMPETITIVE SENIORITY IN THE FACE OF AN UNUSUAL ADVERSE IMPACT ON INCUMBENT EMPLOYEES.

In *Franks* this Court said that granting seniority is an appropriate remedy absent unusual adverse impact upon incumbent employees not generally found in Title VII cases. Since *Franks*, however, the Court has not explained the circumstances that constitute such unusual adverse impact. The substantial and wide-spread adverse impact on incumbent employees present in this case presents an opportunity for the Court to clarify the meaning of the *Franks* exception.[26]

First, more than 400 flight attendants are presently, and have been since, at least, October, 1979, on layoff. If and when positions reopen, these laid-off flight attendants will pit their seniority (less than two years) against that of returning plaintiffs (minimum of ten years) for such vacancies. Under the settlement agreement, plaintiffs will obtain rights superior to employees on layoff. Present employees not recalled within three years from date of layoff will lose all seniority pursuant to the very contractual seniority system which is being superseded by the district court's order.[27]

Second, many active employees likely will be forced to relocate to another city. The six thousand flight attendants represented by IFFA are all employed by TWA, work out of eleven different domiciles located in seven

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[26] This issue, though raised by IFFA's pleadings, argument and evidence, was addressed by neither the district court or Seventh Circuit. In our view, this does not render the issue any less important.

[27] See Article 12(F) of the collective bargaining agreement, App. 68a.

different cities from coast to coast, and are covered under a single collective bargaining agreement. If, at any time after plaintiffs have returned to the work force, TWA determines that there are too many flight attendants at a particular domicile, a number of incumbent employees equal to the excess will be forced to relocate by displacement to another domicile; either by moving her home or by commuting, at her own expense. Which employees are forced to relocate will, of course, be determined by seniority, and plaintiffs will again prevail over incumbent employees.

Third, and perhaps more importantly, the settlement agreement imposes on certain victimized employee-classes the burdens occasioned by remedies benefitting a different victimized class. The decision below grants seniority at the expense of other classes of employees themselves victims of TWA's past discriminatory practices. These groups are:

1) *Black Flight Attendants.* Prior to the effective date of Title VII, TWA had employed only four black flight attendants. All 470 black employees now on the seniority list will be lowered in the seniority ladder as a result of the Seventh Circuit decision; of these, 423 (the number hired after the termination of the last returning plaintiffs) will be lowered by the total number of returning plaintiffs;

2) *Male Flight Attendants.* Many airlines, including TWA, refused to hire males as cabin attendants until after 1970. This practice violated Title VII.[28] Included among TWA's current cabin attendants are 673 males, including males rejected for employment specifically because of their sex prior to 1970. All 673 males will be lowered on

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[28] *Diaz* v. *Pan American Airways*, 442 F.2d 385 (5th Cir. 1971), *cert. den.* 404 U.S. 950 (1971).

the seniority ladder by the grant of retroactive competitive seniority to plaintiffs;

3) *Females Denied Employment by TWA Because of Motherhood.* Prior to 1970, TWA's no-motherhood policy prohibited the hiring of females who *were already* mothers. Included among TWA's present flight attendants are individuals denied employment prior to 1970 for this reason.

4) *Females Who Were Forced to Forego Motherhood as a Condition of Continued Employment.* Those terminated because of the no-motherhood policy were not the only ones who suffered from it; those who chose to forego motherhood to keep their jobs suffered as well. They will suffer again as a result of the return to the bargaining unit of the plaintiffs with retroactive seniority.

Whatever burdens may be required of non-victimized employees in the Title VII remedial scheme, there is a serious question as to the imposition of those burdens on other victimized employees. We urge the Court to grant *certiorari* in order to determine whether the circumstances described above constitute the type of unusual adverse impact contemplated in *Franks.*

CONCLUSION

The writ of *certiorari* should be granted to review the decision of the Seventh Circuit.

Respectfully submitted,

WILLIAM A. JOLLEY
STEVEN A. FEHR
SCOTT A. RAISHER
1300 Traders Bank Building
1125 Grand Avenue
Kansas City, Missouri 64106
Tel: 816-474-1240

Counsel for Petitioner

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 79-2460 and 79-2465

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, *et al.*,
Plaintiffs-Appellees,

v.

TRANS WORLD AIRLINES, INC.,
Defendant,

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Intervening Defendant-Appellant,

ANNE B. ZIPES, *et al.*,
Plaintiffs-Appellees,

v.

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, *et al.*,
Defendants,

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Intervening Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
Nos. 70-C-2071, 74-C-2063—
STANLEY J. ROSZKOWSKI, *Judge*

Argued February 22, 1980—Decided June 13, 1980

Before FAIRCHILD, *Chief Judge*, SWYGERT and BAUER, *Circuit Judges.*

FAIRCHILD, *Chief Judge.* The issue in this appeal is whether the district court properly approved a settlement agreement terminating almost a decade of litigation regarding the claims of the plaintiffs that defendant TWA's policy between 1965 and 1970 of terminating female flight attendants who became mothers was sex discrimination in violation of plaintiffs' rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* The Independent Federation of Flight Attendants (IFFA), the union representing currently employed TWA flight attendants, has intervened in this action and is the appellant here. IFFA asserts that the district court lacked subject matter jurisdiction necessary for it to approve the settlement, that the district court applied an improper standard in approving the settlement including its terms regarding retroactive seniority, and that the settlement violates several statutes. We conclude that the district court acted properly and affirm.

The original complaint in this litigation was filed August 8, 1970. An initial settlement of the class action against the employment practices of American Airlines and TWA was approved by the district court in 1972 but the order was reversed by this court the following year. *Air Line Stewards & Stewardesses Ass'n, Local 550* v. *American Airlines, Inc.*, 490 F.2d 636 (7th Cir. 1973), *cert. denied sub nom. Air Line Stewards & Stewardesses Ass'n, Local 550* v. *Zipes*, 416 U.S. 993 (1974). American Airlines and the plaintiffs reached a settlement of their dispute and the district court's approval of that settlement was affirmed by this court. *Airline Stewards and Stewardesses Ass'n, Local 550* v. *American Airlines, Inc.*, 573 F.2d 960 (7th Cir.) (hereinafter "American Airlines II"), *cert. denied sub nom., Association of Pro-*

fessional Flight Attendants v. *Airline Stewards & Stewardesses Assn., Local 550*, 439 U.S. 876 (1978). In the suit against TWA, the district court entered a summary judgment in favor of all the class members. This court upheld the summary judgment but found that approximately 92% of the plaintiffs' claims were jurisdictionally barred for failure of those plaintiffs to have filed charges of discrimination with the EEOC within 90 days after the alleged unlawful employment practice occurred.[1] The district court's order was vacated and the action remanded to the district court for further proceedings. *In re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F.2d 1142 (7th Cir. 1978). The mandate of this court was stayed. Both the plaintiffs' class and TWA filed petitions for *certiorari*; at the request of the petitioners, the Supreme Court on June 4, 1979, granted a motion to defer consideration of the *certiorari* petitions pending completion of settlement proceedings in the district court. The parties arrived at a settlement, for which approval by the district court was required pursuant to Federal Rule of Civil Procedure 23(e), and presented it to the district court in June, 1979. Under its terms women who were discharged or had children within ninety days of the filing of the EEOC charge, or who were reinstated in a ground position and served in that position within the 90-day period, (hereinafter designated Subclass A), shall receive a *pro rata* share of $1.5 million. Another $1.5 million is to be divided among the larger class (Subclass B) who were discharged earlier—the class whose claims this court had found to be jurisdictionally barred. All the women affected by the airline's no-motherhood policy would be offered reemployment and full company seniority, subject to certain conditions. The

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[1] The 90 day requirement was contained in 42 U.S.C. § 2000e-5(d) (1970). The section has been changed subsequently to extend the time limit to 180 days and was renumbered § 2000e-5(e).

district court was given the power to determine the amount of competitive (union) seniority to grant to each woman. The union representing current TWA personnel who might be affected by this settlement, IFFA, was allowed to intervene to challenge the proposed settlement. The Court held a hearing on objections to the proposed settlement.

The proposal was estimated to create applications for re-employment from 33 members of Subclass A and 172 members of Subclass B. TWA employs in excess of 6,000 flight attendants. A deposition, admitted into evidence at the hearing, of TWA vice president David J. Crombie indicated that in a normal year the airline hires between 400 and 800 new flight attendants.

The district court overruled IFFA's objection to its jurisdiction to consider the proposed settlement and approved the settlement. Regarding jurisdiction, it reasoned that it was not bound by this court's ruling regarding the jurisdictional bar to the claims of Subclass B because of the absence of the issuance of the mandate of this court. The settlement was approved as "fair, reasonable, and adequate for the parties and Subclasses A and B." The court dismissed the action before it and another related action, as proposed by the parties, retaining jurisdiction to determine the question of union seniority, to enforce the terms of the settlement, and to determine attorneys' fees and costs. The district court approved the award of "full restoration of retroactive seniority . . . [as not having] an unusual adverse impact upon currently employed flight attendants in a manner which is not typical of other Title VII cases. . . ."

Federal courts look with great favor upon the voluntary resolution of litigation through settlement. *Metropolitan Housing Development Corp.* v. *Village of Arlington Heights*, slip op. at 13 (7th Cir. March 4, 1980). This rule has particular force regarding class action law-

suits. *Armstrong* v. *Board of School Directors of the City of Milwaukee*, slip op. at 12 (7th Cir. February 19, 1980). District court approval of a class action settlement is appropriate when the district court finds the settlement to be fair, reasonable, and adequate. *Id.* at 13. Such a determination will be reversed on appeal only upon a "clear showing that the district court abused its discretion." *Id.* at 14 (citing *Dawson* v. *Pastrick*, 600 F.2d 70, 75 (7th Cir. 1979); *E.E.O.C.* v. *American Telephone & Telegraph*, 556 F.2d 167, 174 (3d Cir. 1977), *cert. denied*, 438 U.S. 915 (1978).

IFFA contends first that the district court lacked subject matter jurisdiction over the claims of Subclass B, as a result of this court's decision in *In re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F.2d 1142 (7th Cir. 1978). There does not appear to be any dispute over the district court's jurisdiction over the lawsuit as to Subclass A. Thus IFFA argues that once this court had found subject matter jurisdiction to be lacking as to Subclass B, the district court could not approve a settlement granting any benefit to the members of Subclass B.

We have previously considered and rejected a similar claim in a lawsuit related to this case. In *Airline Stewards and Stewardesses Ass'n, Local 550* v. *American Airlines, Inc.*, 573 F.2d 960 (7th Cir. 1978), this court affirmed the district court's approval of a settlement, similar to that involved in the present action, between American Airlines and former flight attendants affected by American's no-motherhood policy. The representative of American's current flight attendants, the Association of Professional Flight Attendants (APFA), as intervenor objected to the settlement on the ground that the court should have determined whether each of the members of the plaintiff class had a claim not time-barred by the EEOC 90-day filing requirement and then refused benefits from the settlement to any class member whose claim was so barred. This court rejected that objection:

> While we believe that in a controverted Title VII case the issues raised by intervenor would be both difficult and interesting, we must recognize that we are here reviewing the propriety of a settlement and not a judgment rendered after a trial. We believe that the issues raised by the intervenor should not be decided on the basis of Title VII law, but rather must be decided on the basis of legal principles regulating judicial review of settlement agreements.
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> . . . . .
>
> [S]ettlements are entered into because of "the very uncertainties of outcome in litigation, as well as the avoidance of wasteful litigation and expense . . . ." *Florida Trailer & Equipment Co.* v. *Deal*, 284 F.2d 567, 571 (5th Cir. 1960). Based on these considerations, this court has held that a district court in reviewing a settlement agreement "should not attempt to decide the merits of the controversy . . . [because] [a]ny virtue which may reside in a compromise is based upon doing away with the effect of such a decision." *Patterson* v. *Stovall*, 528 F.2d 108, 114 (7th Cir. 1976). 573 F.2d at 963.

There are clearly some differences between the situation in *American Airlines II* and that presently before us. In the earlier case, a determination about jurisdiction as to each plaintiff would have required the district court to hold "in excess of 100 mini-trials," a process so time-consuming that the benefit of speedy resolution of a dispute provided by a settlement would have been eliminated. In the present case, barring relief to all the members of Subclass B would be a much simpler and less time-consuming task for the district court. In *American Airlines II*, the settlement avoided litigation of the jurisdictional question. Here, that issue has already been litigated in the district and appeals court.

The overriding principle behind the decision in *American Airlines II* is, nevertheless, equally applicable here. There is a crucial issue, that of jurisdiction as to Subclass B, which has not been finally determined because a challenge to our decision is still pending before the United States Supreme Court. Both parties to the settlement believed it in their interests to approve the settlement rather than await the action of the Supreme Court. Not only does their compromise reflect their perception that the ultimate resolution of this issue could not be predicted with certainty, but prior case law also left the law on this matter open to question.

The Supreme Court has not decided whether the time requirements for filing charges with the EEOC define the courts' subject matter jurisdiction as this court has held, or whether the filing requirement should be treated as a statute of limitation, in which case the doctrines of waiver and estoppel would apply. The courts of appeals are split on this issue.[2] The uncertainty of the outcome

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[2] Several courts have found compliance with the time requirement for filing charges of Title VII violations to be a jurisdictional prerequisite. *In Re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F.2d 1142 (7th Cir. 1978) ("[W]e find nothing of significance to indicate that the 90-day filing requirement is not jurisdictional." *Id.* at 1151); *McArthur* v. *Southern Airways, Inc.*, 569 F.2d 276 (5th Cir. 1978) (*en banc*) ("Since no plaintiff in this cause made a timely filing with the Equal Employment Opportunity Commission (EEOC), the district court should have dismissed this cause for lack of jurisdiction." *Id.* at 277); *Wetzel* v. *Liberty Mutual Insurance Co.*, 508 F.2d 239 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975) ("[T]he timely filing requirements with respect to EEOC appears to be a jurisdictional prerequisite to court action under Title VII." *Id.* at 246 (quoting *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979, 986 (D.C. Cir. 1973)); *Hinton* v. *CPC International, Inc.*, 520 F.2d 1312, 1315 (8th Cir. 1975).

Other courts of appeal have treated the requirement as a statute of limitations subject to equitable considerations. *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978), ("[T]he time provisions of Title VII are subject to equitable modification. Nothing in the legislative history

on this issue before the Supreme Court was considered by the district court to be a major factor leading the parties to reach this settlement, to avoid "the plaintiff class and T.W.A. being forced against their will to continue a legal battle before the Supreme Court in a winner-take-all contest which neither party desires to risk." Slip op. at 3 (N.D. Ill., Sept. 14, 1979). We do not share the view, under the circumstances of this case, that the parties' agreement is tantamount to an attempt to confer subject matter jurisdiction by consent.

Intervenors urge that this court reverse the approval of the settlement order on the basis of the Fifth Circuit's ruling in *McArthur* v. *Southern Airways*, 569 F.2d 276 (5th Cir. 1978) (*en banc*). *McArthur* involved the district court's approval of a settlement between *Southern Airways* and female flight attendants who alleged that the airline violated Title VII as a result of policies forbidding the employment of married or pregnant stewardesses. Subsequent to the settlement approval, 404 F. Supp. 508 (N.D. Ga. 1975), the United States Supreme Court decided *United Air Lines* v. *Evans*, 431 U.S. 553 (1977), which held that "[a] discriminatory act which is not made the basis for a timely charge . . . has no legal consequences" and does not create a continuing violation unless a present violation exists. *Id.* at 558. Because no plaintiff in *McArthur* had made a timely filing with the EEOC nor were there continuing violations under the *Evans* standard, the court of appeals reversed the settlement approval on the ground that the district court had lacked jurisdiction oved the action and therefore had no authority to approve the settlement. 569 F.2d at 277.

The instant action may be distinguishable from *McArthur*. In *McArthur* there was found to be no subject

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compels us to treat those provisions as jurisdictional." *Id.* at 475); *Hart* v. *J. T. Baker Chemical Corp.*, 598 F.2d 829 (3d Cir. 1979) ([T]he 180-day period is not jurisdictional." *Id.* at 831).

matter jurisdiction at the time of approval of the settlement but here the district court clearly had subject matter jurisdiction over the claims of eight per cent of the plaintiff class. In any event, we decline to adopt the *McArthur* rule.[3] We think the principles favoring settlement of class action lawsuits remain the same regardless of whether the disputed legal issues center on the jurisdiction of the court over the action. Where, as here, the jurisdictional question is not settled with finality, parties should not be forced to litigate the issue of jurisdiction if they can arrive at a settlement that is otherwise appropriate for district court approval.

In deciding whether the proposed settlement was "fair, reasonable and adequate," the district court was required to consider whether the class members were properly represented by their representatives. The settlement granted significant awards of money, job reinstatement, and seniority to members of the class, none of whose members have made any objection to the settlement. The court also was required to consider the effects of the settlement on the interests of the public as a whole and upon other parties such as the intervenors in this action. We have been presented with no argument that this settlement harms the public as a whole and we note that the settlement serves the public policy of remedying past acts of sex discrimination and the consequences of those past acts. The court recognized the right of the intervenor to present its objections to the court before it would decide whether to approve the proposed settlement. *American Airlines II*, 573 F.2d at 961. The right to have its objections heard does not, of course, give the intervenor the right to block any settlement to which it objects. The district court was presented with a settlement proposal including reinstatement rights for class

[3] This opinion has been circulated among all judges of this court in regular active service. No judge favored a rehearing *en banc* on the question of our declining to follow *McArthur*.

members numbering about three per cent of the total flight attendants represented by IFFA. Testimony indicated that providing positions for these reinstated attendants would normally be possible as a result of normal attrition of workers in less than half a year. The agreement provided that no currently employed attendant would be required to lose employment in order to accommodate a reinstated attendant. The Supreme Court in *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976) held that granting of retroactive seniority is ordinarily appropriate in Title VII cases:

> [D]istrict courts should take as their starting point the presumption in favor of rightful-place seniority relief, and proceed with further legal analysis from that point; and that such relief may not be denied on the abstract basis of adverse impact upon interests of other employees but rather only on the basis of unusual adverse impact arising from facts and circumstances that would not be generally found in Title VII cases. *Id.* at 780.

The district court found that full restoration of union seniority to reinstated class members would not have an unusual adverse impact on currently employed flight attendants.

Examining the district court's actions in approving the settlement agreement and in granting retroactive seniority, we find no abuse of discretion. We have considered the other arguments made by the appellant and find them to be without merit.

The judgment appealed from is AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

September 17, 1980

[Received Sep. 20, 1980, Goghlan, Joyce and Nellis]

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge

Nos. 79-2460 & 2465

AIRLINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, *et al.*,
Plaintiffs-Appellees,

vs.

TRANS WORLD AIRLINES, INC., *et al.*,
Defendants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
Nos. 70-C-2071, 74-C-2063—
STANLEY J. ROSZKOWSKI, *Judge*

ORDER

Treating the "Petition for Rehearing *In Banc*" as a petition for rehearing under Rule 40, F.R.A.P., the members of the original panel having voted to DENY,

Treating the petition as a suggestion for rehearing *in banc* under Rule 35, F.R.A.P., no judge in regular, active service having requested a vote thereon,

Accordingly, IT IS ORDERED that the petition for rehearing *in banc* is hereby, DENIED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 70 C 2071

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, PAMELA DAILING, SADIE SUE LAKE, PAT SANTINI, VIRGINIA HIRT and BONNIE YODER,

Plaintiffs,

v.

TRANS WORLD AIRLINES, INC.,

Defendant.

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74 C 2063

ANNE B. ZIPES, FRANCIS M. SWIFT, *et al.*,

Plaintiffs,

vs.

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO and TRANS WORLD AIRLINES, INC.,

Defendants.

ORDER

Union-Intervenor's objection to this court's jurisdiction and authority to approve the proposed settlement agreement is hereby overruled. The crux of the Union's argument is that the recent Seventh Circuit opinion entered in this litigation and entitled *In Re Consolidated Pretrial*

Proceedings, 582 F.2d 1142 (7th Cir. 1979), wherein the court held that the claims of all members of Subclass B were jurisdictionally defective, represents a litigated final judgment in this case which is legally binding on this court. Thus, applying the jurisdictional portion of the *Consolidated* decision to the case at bar, the Union contends that this court is without authority to exercise its discretion in deciding whether to approve that part of the proposed settlement agreement which allows for an award of accrued and/or retroactive "competitive" seniortiy to members of Subclass B.

For the reasons stated below, the court finds that the *Consolidated* decision does not serve to bar this court from exercising its authority over those portions of the proposed settlement agreement pertaining to members of Subclass B.

A federal appellate court opinion has no legal relevance or impact upon lower court proceedings until it ripens into a final judgment formally communicated to the district court through the issuance of the court of appeals' mandate and opinion in accordance with Rule 41 (a), F.R.A.P. *Bailey* v. *Henslee*, 309 F.2d 840 (8th Cir. 1962), *see also*, *Alphin* v. *Henson*, 552 F.2d 1033 (4th Cir. 1977), wherein the court held that prior to the issuance of its mandate a court of appeals' decision was not final and could be amended to conform to then existing law.

Significantly, no Seventh Circuit mandate has issued in the *Consolidated* appeal as to the plaintiff class members.[1] Pursuant to the provisions of Rule 41(b), F.R.A.P., the plaintiff class requested and was granted a stay of mandate pending final disposition by the Su-

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[1] Although the court of appeals mandate has issued as to defendant T.W.A., that does not "finalize" those portions of the opinion relating to the claims of the Subclass B members.

preme Court of its petition for certiorari.[2] Contrary to the Union's assertion, the filing of the *Consolidated* opinion with the Clerk of the Seventh Circuit does not constitute a final judgment order, and this court is therefore not presently forbidden from exercising its jurisdiction over the claims of Subclass B members. To paraphrase Mr. Justice Stevens in *United Airlines* v. *Evans*, 431 U.S. 533 (1977), the mere entry of the *Consolidated* decision is an event from which no legal consequences flow until such time as the requisite mandate issues.

The court's decision today is further supported by the fact that the legal effect of a stay of mandate is to maintain and continue the status quo between the parties to the appeal. *Algonquin Gas Trans. Co.* v. *Township of Bernards*, 112 F.Supp. 86, 90 (D.C. N.J. 1953). That is to say that neither party can reap any benefit nor incur any legal detriment as a result of the decision until the mandate issues. Implicit in the maintenance of the status quo is the judicial recognition that the parties to the controversy are free to settle their differences prior to the issuance of the mandate. To hold differently would result in the plaintiff class and T.W.A. being forced against their will to continue a legal battle before the Supreme Court in a winner-take-all contest which neither party desires to risk. Such a harsh result certainly can not be intended by the court of appeals when the stay of mandate is granted.

The remaining objections raised by the Union address themselves to the merits of the proposed settlement agreement and need not be considered at this time.

ENTER:

/s/ Stanley J. Roszkowski
STANLEY J. ROSZKOWSKI
Judge

Dated: Sep. 14, 1979

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[2] Per order dated June 4, 1979, the Supreme Court deferred consideration of plaintiff class' certiorari petition pending approval of the proposed settlement agreement.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 70 C 2071

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, *et al.*,

Plaintiffs,

v.

TRANS WORLD AIRLINES, INC.,

Defendant.

No. 74 C 2063

ANNE B. ZIPES, *et al.*,

Plaintiffs,

v.

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO and TRANS WORLD AIRLINES, INC.,

Defendants.

ORDER APPROVING SETTLEMENT AND DISMISSING ACTIONS

The court has considered the proposed Settlement Agreement, as amended, for the compromise of these actions and has considered the written and oral presentations of the parties under Rule 23(e), F.R.C.P. The court finds that proper notice of the proposed settlement

and the hearings thereon was given to the members of plaintiff class and Subclasses A and B; and that no class member objected to the settlement. The court also finds that the settlement agreement is fair, reasonable, and adequate for the parties and Subclasses A and B.

Accordingly, it is ordered, that the Settlement Agreement, as amended, is approved and the actions are dismissed. The court finds, pursuant to Rule 54(b), F.R.C.P., that no just reason exists to delay enforcement of or appeal from this Order.

The court retains jurisdiction:

(a) to determine the total amount of seniority and credit for length of service (both accrued and retroactive) for re-employed class members as provided in Section V B of the Settlement Agreement as amended,

(b) to enforce the terms of the Settlement Agreement and the orders entered herein, including this Order,

(c) to adjudicate any disputes which may arise concerning the interpretation of any part of the Settlement Agreement, including matters relating to the claims of eligibility of class members, and

(d) to determine the amounts of attorneys' fees and reimbursement of costs and expenses which may be awarded to plaintiffs' lawyers and the representatives of the class.

ENTER:

/s/ Stanley J. Roszkowski
STANLEY J. ROSZKOWSKI
Judge
United States District Court

Dated November 8, 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 70 C 2071

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, *et al.*,

Plaintiffs,

v.

TRANS WORLD AIRLINES, INC.,

Defendant.

No. 74 C 2063

ANNE B. ZIPES, *et al.*,

Plaintiffs,

v.

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, and TRANS WORLD AIRLINES, INC.,

Defendants.

ORDER AWARDING SENIORITY

The court having considered the evidence, testimony and briefs which have been submitted in connection with the issue of seniority, pursuant to Section 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) and Section V of the Settlement Agreement, as amended, and the court finding that full restoration of retroactive seniority will not have an unusual adverse impact upon

currently employed flight attendants in a manner which is not typical of other Title VII cases, it is ordered that each class member who is now employed as a TWA flight attendant or who will hereafter become employed as a flight attendant by TWA under the Settlement Agreement shall be credited with the amount of union (occupational) seniority to which she was entitled on the date on which her employment was terminated, plus credit for such seniority for the "compensation period", as defined in the Settlement Agreement (at page 3), less the deductions provided therein (at p. 8), the terms of which are incorporated by reference and are adopted as part of this Order.

The court having approved the Settlement Agreement in a separate order, it is ordered that this case be, and is hereby, dismissed. The court finds, pursuant to Rule 54(b), F.R.C.P., that no just reason exists to delay enforcement of or appeal from this Order.

However, this court hereby retains jurisdiction:

(a) to enforce the terms of the Settlement Agreement and the orders entered herein, including this Order,

(b) to adjudicate any disputes which may arise concerning the interpretation of any part of the Settlement Agreement, including matters relating to the claims of any eligibility of class members, and

(d) to determine the amounts of attorneys' fees and reimbursement of costs and expenses which may be awarded to plaintiffs' lawyers and the representatives of the class.

ENTER:

/s/ Stanley J. Roszkowski
STANLEY J. ROSZKOWSKI
Judge
United States District Court

Dated Nov. 8, 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 70 C 2071

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, PAMELA DAILING, SADIE SUE LAKE, PAT SANTINI, VIRGINIA HIRT and BONNIE YODER,

Plaintiffs,

vs.

TRANS WORLD AIRLINES, INC.,

Defendant.

No. 74 C 2063

ANNE B. ZIPES, FRANCES M. SWIFT, *et al.*,

Plaintiffs,

vs.

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO and TRANS WORLD AIRLINES, INC.,

Defendants.

AMENDMENT TO SETTLEMENT AGREEMENT

The Settlement Agreement which has been heretofore entered into between Trans World Airlines, Inc., and the undersigned representatives of the class is hereby amended as follows:

Section V.B shall provide as follows:

It is agreed that the total amount of seniority and credit for length of service (both accrued and retroactive) for the compensation period will be determined by the Court in its discretion, pursuant to the provisions of Section 706(g), and all other applicable provisions of law, without contest or objection by TWA. The Court's determination will be applied retroactively for all class members who are re-employed after the date of this Agreement but prior to said determination. The class representatives and their attorneys agree and covenant diligently to present to the Court the questions and issues involved in the Court's determination of seniority and credit for length of service within a reasonable time after the entry of an order approving the settlement.

Dated this 22 day of August, 1979.

/s/ Anne B. Zipes
ANNE B. ZIPES
Individually and on behalf of
the Plaintiff Class

Dated this 17 day of August, 1979.

/s/ Pat Santini
PAT SANTINI
Individually and on behalf of
the Plaintiff Class

Dated this 22nd day of August, 1979.

GARDNER, CARTON & DOUGLAS,
Attorneys for
TRANS WORLD AIRLINES, INC.

BY: /s/ Laurence A. Carton
LAURENCE A. CARTON
On behalf of
Trans World Airlines, Inc.

/s/ Kevin M. Forde
KEVIN M. FORDE
One of the Attorneys for
Sub-Class A

/s/ Aram A. Hartunian
ARAM A. HARTUNIAN
One of the Attorneys for
Sub-Class B

KEVIN M. FORDE, ESQ.
111 West Washington Street
Chicago, Illinois 60603

PRESSMAN & HARTUNIAN, CHTD.
Suite 4005
55 East Monroe Street
Chicago, Illinois 60603
(312) 372-6475

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 70 C 2071

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO, PAMELA DAILING, SADIE SUE LAKE, PAT SANTINI, VIRGINIA HIRT and BONNIE YODER,

Plaintiffs,

v.

TRANS WORLD AIRLINES, INC.,

Defendant.

No. 74 C 2063

ANNE B. ZIPES, FRANCES M. SWIFT, *et al.*,

Plaintiffs,

v.

AIR LINE STEWARDS AND STEWARDESSES ASSOCIATION, LOCAL 550, TWU, AFL-CIO and TRANS WORLD AIRLINES, INC.,

Defendants.

SETTLEMENT AGREEMENT

I. DEFINITIONS

Os used herein, the following words and phrases shall have the following meanings:

"Lawsuits" shall mean the cases listed in the caption of this Settlement Agreement.

"Hostess" shall mean a female flight cabin attendant.

"Class" shall include those persons who have comprised the class as heretofore defined in Orders which have been entered in Case No. 70 C 2071 on July 16, 1971, September 16, 1974 and October 10, 1974 and who have not previously opted out under Rule 23(c)(2)(A), F.R.C.P. In the event that the Court enters an Order which creates two or more subclasses, the word "class" shall include all of the persons who comprise the subclasses. For the purposes of this Agreement, the Class is treated as consisting of two sub-classes as delineated in the opinion of the U.S. Court of Appeals for the Seventh Circuit in *In Re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F. 2d 1142 (7th Cir. 1978).

"Class Group A" shall mean: (1) those persons who were terminated as TWA hostesses on account of pregnancy or the adoption of a child, *and* the pregnancy ended or the adoption occurred on or after March 2, 1970, and (2) those persons who were terminated as TWA hostesses on or after July 2, 1965 on account of pregnancy or the adoption of a child, *and* the pregnancy ended or the adoption occurred prior to March 2, 1970 but who were thereafter reinstated in ground duty positions, *and* who continued their employment as ground personnel continuously until on or after March 2, 1970.

"Class Group B" shall mean those persons who are members of class Group A, who were terminated as hostesses by TWA on or after July 2, 1965 on account of pregnancy or the adoption of a child *and* the pregnancy ended or the adoption occurred prior to March 2, 1970.

"Terminated" shall mean fired or forced to resign.

"Compensation Period" shall mean the period of time which commenced upon the termination of a

class member's employment and ends on the date on which this Settlement Agreement is signed by TWA but it does not include any period after the beginning of re-employment for which TWA offered or granted reinstatement as a hostess with full pay, seniority and credit for length of service retroactive to the time when she was ready, willing and able to resume working as a hostess.

"Final Order Date" shall mean the date on which the order described in Section X becomes final and no longer subject to court review.

II. This Agreement is entered into between Trans World Airlines, Inc. (hereinafter referred to as "TWA") and the undersigned representatives of the class for the purpose of compromising, settling and terminating all litigation of the lawsuits (including, but not limited to, the petitions for writs of certiorari now pending in U.S. Supreme Court, docket numbers 78-1545 and 78-1549) and putting finally to rest all of the claims, issues and questions of fact and law which have or might have been raised on the facts alleged in the pleadings.

The parties hereto agree that the execution of this Agreement by TWA is not and shall not be construed as an admission by it or deemed to be evidence of the validity of any such claims or its liability for any such claims or of any unlawful acts by it whatsoever, nor shall this Agreement or any of the terms hereof be offered or received in evidence in any civil or administrative action or proceeding as an indication of wrongdoing by TWA or of its legal position in this or other litigation. TWA expressly disclaims any liability in these lawsuits and states that it is entering into this Agreement to avoid further expenses, inconvenience and the distraction of burdensome and protracted litigation.

III. SETTLEMENT BENEFITS TO BE OBTAINED BY CLASS MEMBERS

In consideration of the execution of the Release described herein and in consideration of the dismissal of these lawsuits against TWA in all respects (except, possibly, as to the matters referred to in Section V.B), TWA hereby covenants and agrees to do the things and perform the acts described herein, at the times and in the manners set forth in this Agreement, all of which shall be subject to the conditions set forth herein.

A. TWA will pay to the Class the aggregate amount of Three Million dollars ($3,000,000), as follows:

1. TWA will pay to Class Group A the sum of One Million Five Hundred Thousand Dollars ($1,500,000);

2. TWA will pay to Class Group B the sum of One Million Five Hundred Thousand Dollars ($1,500,000).

After deduction therefrom of all amounts awarded by the Court for plaintiffs' attorneys' fees, costs and expenses of litigation, the net amount will be prorated among the class members as provided in Section IV hereof. TWA has no responsibility concerning the calculations or allocations of the total amount among the class members or for fees, costs and expenses.

B. TWA will re-employ as hostesses all class members who are ready, willing and qualified (as defined in Sections VI and IX) to perform the duties required in such re-employment. Any class member who is not either ready, willing or qualified (as defined in Sections VI and IX) for re-employment shall receive from TWA the trip passes described in Section VII.

C. All re-employed class members shall have, be credited with and enjoy the amount of seniority and credit for length of service as is provided in Section V hereof.

D. TWA will have no monetary or other obligation to any member of the class or to any representative or attorney for the class unless expressly provided in this Agreement.

IV. PAYMENT OF MONEY

TWA will distribute to each member of the class the money payment described in Section IIIA hereof no later than thirty (30) days following the Final Order Date or the date when the class representatives furnish to TWA the calculation for each class member as provided hereinafter, whichever last occurs; provided further, however, that if by that time the Court has not determined the total amounts of attorneys' fees and expenses, TWA will have until thirty (30) days following said determination in which to make the payments to class members. Upon such distribution, TWA will provide each class member with a copy of the calculation regarding her payment and will certify to the Court and the attorneys for the plaintiffs that all required payments have been duly made. TWA's obligation to make employer's F.I.C.A. contributions will be in addition to and independent of the terms of this Agreement.

CLASS GROUP A

Distribution of the money paid hereunder to the members of Class Group A shall be made on a pro-rata percentage basis to each member thereof calculated as follows. The amount of base pay which each class member would have earned during the compensation period (except for periods of disability as described in Section

V.A) shall be reduced by her actual gross earnings during the compensation period. The percentage which each member's resulting amount bears to the total thus calculated for all members of Class Group A shall then be applied to the settlement proceeds as calculated pursuant to Section III.A above and she shall receive the amount calculated thereby, less all appropriate deductions as provided above. For example, if the total net earnings thus calculated to have been "lost" by the entire Class Group A during the compensation period is $10,000,000, and a member's net loss of earnings is $50,000, she will receive one-half of one percent of the net settlement proceeds payable to Class Group A. The relevant facts and data will be gathered and utilized under the Court's supervision and direction.

Unclaimed or unpaid funds, if any, shall be distributed as the Court may direct.

CLASS GROUP B

Distribution of the money paid hereunder to the members of Class Group B shall be made on a pro-rata percentage basis to each member thereof calculated as follows. The amount of base pay which each class member would have earned during the compensation period (except for periods of disability as described in Section V.A) shall be reduced by her actual gross earnings during the compensation period. The percentage which each member's resulting amount bears to the total thus calculated for all members of Class Group B shall then be applied to the settlement proceeds as calculated pursuant to Section IIIA above and she shall receive the amount calculated thereby, less all appropriate deductions as provided above. For example, if the total net earnings thus calculated to have been "lost" by the entire Class Group B during the compensation period is $10,000,000, and a member's net loss of earnings is $50,000, she will receive

one-half of one percent of the net settlement proceeds payable to Class Group B. The relevant facts and data will be gathered and utilized under the Court's supervision and direction.

Unclaimed or unpaid funds, if any, shall be distributed as the Court may direct.

V. SENIORITY AND CREDIT FOR LENGTH OF SERVICE

A. Each re-employed class member shall be credited with the amount of company seniority and length of service to which she was entitled at the date on which her employment was terminated plus company seniority and such length of service for the entire compensation period, except for those periods of time during which she was disabled from working by reason of pregnancy or otherwise. For each pregnancy which terminated in the birth of a child, the period of disability shall be deemed to be nine (9) months. In the event pregnancy was terminated other than by the birth of a child, the period of disability shall be deemed to be the number of weeks of the pregnancy.

B. TWA agrees with the class that the class members who will be re-employed shall be restored to full occupational (union) seniority and credit for length of service to the same extent as is provided in Section V.A above. However, in the event of the timely objection of any interested person, it is agreed that the amount of seniority and credit for length of service for the compensation period will be determined by the Court in its discretion, pursuant to the provisions of Section 706(g), and all other applicable provisions of law, without contest or objection by TWA. The Court's award of seniority and credit for length of service will be added to each class member's seniority and credit for length of service to

which she was entitled at the time her employment was terminated. The Court's determination will be applied retroactively for all class members who are re-employed after the date of this Agreement but prior to said determination. The class representatives and their attorneys agree and covenant diligently to present to the Court the questions and issues involved in the Court's determination of seniority and credit for length of service within a reasonable time after the entry of an order approving the settlement.

VI. ELIGIBILITY FOR RE-EMPLOYMENT

TWA agrees to offer: (1) flight attendant retraining to all class members and (2) re-employment as flight attendants to those class members who satisfactorily complete such retraining. TWA will provide retraining classes, the last of which shall commence prior to the expiration of one (1) year following the Final Order Date. TWA will have no obligation to retrain or re-employ any class member following the end of such one (1) year period if such class member has either not qualified for such retraining or re-employment, has elected not to participate in such retraining or has elected not to accept such re-employment during such one (1) year period. TWA will not discriminate in any way against any class member by virtue of the fact that she is a class member or adopt or enforce any employment practice, condition or qualification which operates to discriminate against any class member as such. A class member shall be eligible for re-employment if she fulfills TWA's physical requirements (reasonably applied), medical examination, completion of retraining, and timely files the following described Re-Employment Application; provided, however, that no class member shall be eligible for re-employment who has been re-employed after June 1, 1972 who has been terminated for cause or who has resigned under

circumstances which reasonably do not entitle her to be re-employed.

Each class member who desires re-employment shall in writing so indicate by providing the following information on a Re-Employment Application form to be prepared and distributed by plaintiffs' attorneys:

A. Current full name, name as of termination, social security number, and former TWA employee number

B. Home address and mailing address, including zip code

C. The last TWA base at which she was employed.

D. Approximate date on which she was last employed by TWA

E. Preferences concerning location of new home base

F. The inclusive dates of each full-term and partial-term pregnancy and all other periods of disability.

G. Financial information necessary for the calculation described in Section IV

Each class member desiring re-employment shall forward the said form to the attorneys for the plaintiffs, who shall then keep one copy for retention in their files and forward one copy to TWA. No class member shall be entitled to re-employment under this Agreement unless she completes and returns the aforesaid form to the attorneys for the plaintiffs within sixty (60) days after the date of the commencement of the hearing described in Section X; provided, however that in the case of any person who is (a) named in the list of class

members attached hereto but who does not receive notification of her rights because of an incorrect mailing address or (b) not named in the aforesaid list but who demonstrates diligence and entitlement to class membership, the deadline for filing the aforesaid form shall be 30 days prior to the commencement of TWA's last retraining class.

Within thirty (30) days after entry by the Court of an order (if any) determining the matters described in Section V.B, or within thirty (30) days expiration of the deadline for filing the Re-Employment Application, whichever is later, TWA shall prepare a special list showing the adjusted seniority date of each class member who has applied for re-employment, one copy of which shall be supplied to the attorneys for the class representatives. Each class member's Re-Employment Application shall be acknowledged in writing by TWA by certified mail, addressed to the class member, advising her of her adjusted seniority date.

VII. TRIP PASSES FOR NON-RETURNING CLASS MEMBERS

Each class member who does not become re-employed shall be entitled to receive twelve (12) trip passes for use at any time or times during her lifetime. Each trip pass shall be good for travel on TWA for herself, her spouse or her child (provided that the child is (a) a dependent for IRS purposes and (b) is either under 21 or is a full time student under 23) from origin, point to destination and return to point of origin with enroute stopover privileges. The trip passes will be of the same priority class as trip passes for retired TWA hostesses (Class 9); provided, however, that such retired hostesses and other retired persons utilizing Class 9 passes shall have higher boarding priority.

VIII. IDENTIFICATION OF THE CLASS MEMBERS

The parties hereto agree that the list of class members attached hereto contains the names and last known addresses of all persons known by either side to be entitled to membership in the Plaintiff Class. In the event any person not listed on the attached list of class members files with the Court (together with service of a copy on the attorneys for the class representatives and the attorneys for TWA) a sworn petition setting forth sufficient facts to demonstrate diligence and entitlement to membership in the class, upon approval by the Court of said petition the person thus asserting class membership shall be entitled to all of the rights and benefits of this Agreement which are then reasonably available.

IX. RE-EMPLOYMENT PROCEDURES

For the purpose of retraining applicants for re-employment, TWA will conduct retraining classes. TWA will notify each applicant for re-employment (in writing, giving at least thirty (30) days' advance notice) of the commencement date of the retraining class which she is to attend. If the applicant fails within fifteen (15) days after the date of the notice either to accept the offer or provide a reasonable excuse for not accepting, she will forfeit her right to re-employment under this Agreement. Failure to accept any subsequent offer shall forfeit her right to re-employment unless it is due to temporary physical disability or other personal hardship; provided, however, any applicant who is excused from attending a retraining class because of personal hardship shall not accrue seniority for any purpose during the period beginning with the first day of the retraining class from which she was excused and ending on the first day of the retraining class which the applicant eventually successfully completes. Any class member who fails to meet the

criteria described herein shall be ineligible to attend that class and she shall have sixty (60) days thereafter within which to meet the criteria. If she is deemed to have failed the medical examination, she may object to the determination made by the company doctor and obtain review thereof by petition to this Court, filed within sixty (60) days after receipt by her of TWA's written advice thereof.

Any class member who has been designated to attend the last retraining class to be conducted by TWA hereunder shall meet its weight standards and other qualifications no later than the first day of such retraining class or forfeit all rights of re-employment hereunder. All class members who have not accepted retraining for any reason prior to the last retraining class must accept retraining in such class or otherwise forfeit all rights of re-employment hereunder.

Each class member who successfully completes retraining will be permitted to select assignment to a flight attendant base (or bases), of her choice, at which a vacancy exists, provided that no flight attendant having greater seniority desires to fill such vacancy. If a class member is unable to obtain a base assignment which she desires, she will be assigned to fill a vacancy at any base selected by TWA.

Upon resumption of duties as hostess, each class member shall be provided with the required basic uniforms at TWA's expense.

X. SETTLEMENT PROCEDURES

This Settlement Agreement shall be submitted to the Court for its preliminary approval. If the Court grants preliminary approval and deems it a fit and proper Agreement for submission to the procedures described in Rule 23(e), F.R.C.P., plaintiffs' attorneys will draft all

orders, notices and other papers necessary for compliance with the orders and directions of the Court and for the implementation of the procedures required under Rule 23, F.R.C.P., including a proposed form of notice to class members. All such papers shall be submitted to the attorneys for TWA at a reasonable time prior to submission to the Court, in the normal manner applicable to the presentation of any motion or application to the Court. The parties shall jointly file in the United States Supreme Court a motion and stipulation asking that the current pending petitions for writs of certiorari be held in abeyance during the settlement procedures, to be dismissed immediately after the Final Order Date.

Plaintiffs shall prepare an alphabetical list of all class members' names. One copy of the notice shall be sent by first-class U.S. mail to each class member.

The costs of notifying the class, including the preparation and reproduction of notice forms, class lists, purchase of envelopes, postages, handling and mailing, shall be borne by plaintiffs, to be recovered only if and when the Court authorizes reimbursement out of the settlement funds.

After notice has been distributed to class members and after hearing has been held pursuant thereto, plaintiffs and TWA will apply to the Court for an order which approves this Settlement Agreement and dismisses these cases against TWA. Plaintiffs will seek an order which is final and appealable under Rule 54(b), F.R.C.P.

If the Court enters an order in accordance with the foregoing, the Final Order Date, as that term is used in this Agreement, shall be:

A. If no valid notice of appeal is filed within the time prescribed in Rule 4(a), Federal Rules of Appellate Procedure, the date on which the time for filing the notice of appeal expires thereunder.

B. If a valid notice of appeal is filed, the date on which such appeal is dismissed or, if the appeal is not dismissed, the date on which an order is entered which affirms the District Court's approval of the settlement plus the expiration of time or the occurrence of judicial events which render such order no longer subject to review or modification.

If the District Court enters an order disapproving of this Settlement Agreement and said order is not thereafter reversed or modified so that approval is otherwise obtained, this Agreement shall be null and void and shall have no force or effect.

XI. RETURN OF DOCUMENTS

Within (30) days after the Final Order Date, all documents now in the document depository which were obtained from TWA shall be returned to TWA.

XII. QUITTANCE PAPERS

Within seven (7) days after the Final Order Date, plaintiffs will deliver to TWA a general release in the form attached hereto, signed by one or more of the class representatives on behalf of all class members, witnessed by two of the lawyers who are of record representing plaintiffs in this case, and acknowledged by a notary public. In addition, TWA shall have the right to include on the check mailed to each member of the class a general release, and the execution of such release by the class member shall be a condition precedent to the right of the class member to receive any remuneration under this Settlement Agreement.

XIII. EXCLUSIVITY

Nothing contained in any other agreement or writing and no right or obligation which has arisen or accrued

outside of this Settlement Agreement (including prior, current and future labor agreements) shall be deemed to modify, change or diminish the rights and obligations which arise under this Agreement.

XIV. ENFORCEMENT OF THIS AGREEMENT

The Order of the District Court approving this settlement shall incorporate and adopt by reference the terms of this Agreement. This Agreement shall be enforceable in the United States District Court for the Northern District of Illinois by virtue of the powers of said Court to enforce its orders and judgments, in addition to any and all other rights and remedies which plaintiffs may have under the common law and statutes of the United States.

Dated this 18th day of June, 1979.

GARDNER, CARTON & DOUGLAS,
Attorneys for
TRANS WORLD AIRLINES, INC.

BY: /s/ Laurence A. Carton

TRANS WORLD AIRLINES, INC.

BY: /s/ David J. Crowley

Ulrich V. Hoffman, an officer of Trans World Airlines, Inc., hereby certifies that the above-named signators have the authority to execute this agreement on behalf of Trans World Airlines, Inc.

/s/ Ulrich V. Hoffman

/s/ Pamela Dailing Giovanelli
PAMELA DAILING GIOVANELLI
Individually and on behalf of
the Plaintiff Class

This 21 day of June, 1979, PAMELA DAILING GIOVANELLI appeared before me, a person authorized to administer oaths in and for the County of Pima, State of Arizona, and acknowledged that she executed the foregoing agreement by affixing her signature thereto at the place indicated above.

/s/ Kenneth S. Walker

[SEAL]

/s/ Anne B. Zipes
ANNE B. ZIPES
Individually and on behalf of
the Plaintiff Class

This 25 day of June, 1979, ANNE B. ZIPES appeared before me, a person authorized to administer oaths in and for the County of West, State of New York, and acknowledged that she executed the foregoing agreement by affixing her signature thereto at the place indicated above.

by /s/ Doris J. Allen
DORIS J. ALLEN
Notary Public

[SEAL]

/s/ Pat Santini
PAT SANTINI
Individually and on behalf of
the Plaintiff Class

This 19th day of June, 1979, PAT SANTINI appeared before me, a person authorized to administer oaths in and for the County of Marin, State of California, and acknowledged that she executed the foregoing agreement by affixing her signature thereto at the place indicated above.

/s/ Jean Cox-Treverton

[SEAL]

One of the Attorneys for
Plaintiffs

One of the Attorneys for
Plaintiffs

PRESSMAN & HARTUNIAN, CHTD.
Suite 4005
55 East Monroe Street
Chicago, Illinois 60603
(312) 372-6475

ARNOLD I. SHURE
Attorney at Law
10 South LaSalle Street
Chicago, Illinois 60603
(312) 346-4537

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 77-1325

In re:
CONSOLIDATED PRETRIAL PROCEEDINGS IN THE AIRLINE CASES

Appeal of:
AMERICAN AIRLINES, INC., and
TRANS WORLD AIRLINES, INC.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

Nos. 70 C 2069, 70 C 2071, 72 C 498, 74 C 2063 and 74 C 2762—FRANK J. MCGARR, *Judge*

Argued January 26, 1978—Decided August 24, 1978

Before FAIRCHILD, *Chief Circuit Judge*, PELL and SPRECHER,* *Circuit Judges.*

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* Although Judge Sprecher heard oral argument, he later disqualified himself from any participation in the decision, and preparation of the opinion, in this case.

PELL, *Circuit Judge.* This is an interlocutory appeal under 28 U.S.C. § 1292(b) of two district court orders. Pretrial proceedings in the district court involved consolidated Title VII [1] class action suits by female flight cabin attendants against American Airlines, Inc. and Trans World Airlines, Inc. (TWA). Subsequent to the filing of this appeal, American entered into a settlement agreement which was challenged and approved on appeal. *Airline Stewards and Stewardesses Association, Local 550* v. *American Airlines, Inc.*, No. 77-2098 (7th Cir. Mar. 14, 1978).

THE OCTOBER 18, 1976 ORDER

TWA thus remains as the only appellant and appeals from the district court's summary judgment order of October 18, 1976, which held TWA's "motherhood" restrictions prior to October 1970 to be a violation of § 703 (a) of the Civil Rights Act, 42 U.S.C. § 2000e-2(a).[2] Specifically, TWA maintained a policy of removing female flight cabin attendants from flight duty while pregnant, and thereafter if a child was born. This policy also extended to female flight cabin attendants who

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[1] Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

[2] This section provides:

> It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

adopted a child. These employees who became mothers either by childbirth or by adoption were terminated permanently unless they were willing to accept employment in ground duty positions. This policy, however, did not apply to their male counterparts. Male cabin attendants, designated "pursers" by TWA, could remain on flight duty after becoming a parent. Although pursers served on international flights, their responsibilities were substantially the same as those of female flight cabin attendants.[3]

TWA challenges the summary judgment on the grounds that: (1) its policy was not gender-based and therefore did not constitute sex discrimination: (2) its policy did not have a discriminatory effect; and (3) if the policy did discriminate on the basis of sex, the discrimination was a bona fide occupational qualification (BFOQ) reasonably necessary to the normal operation of TWA's business.[4]

To clarify the challenged portion of TWA's policy, the plaintiff class does not challenge that aspect of TWA's policy which removed female flight cabin attendants from flight duty when they became pregnant. Furthermore, the district court's order, by reference to an earlier order involving American Airlines, specifically stated that this aspect of the policy was not discriminatory. *See Condit* v. *United Air Lines*, 558 F. 2d 1177 (4th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3581 (Mar. 21, 1978). At issue then is only the policy of requiring fe-

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[3] *See Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 439-42 (D.C. Cir. 1976), *cert. denied*, 46 U.S.L.W. 3527 (Feb. 21, 1978).

[4] 42 U.S.C. § 2000e-2(e) provides in pertinent part:

> [i]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . sex . . . in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . .

male cabin attendants who become mothers to resign or accept ground duty positions while not imposing similar restrictions on their male counterparts who become fathers.

In arguing that its policy was not gender-based, TWA relies on *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), in which the Supreme Court held that General Electric's disability benefit plan did not violate Title VII even though it failed to cover pregnancy-related disabilities. To draw support for its argument from *Gilbert*, TWA appears to focus on the maternity leave aspect of its policy and to minimize addressing the only portion of the policy that is at issue, the no-motherhood restriction. *Gilbert* clearly provides no support for the proposition that TWA's no-motherhood policy withstands Title VII scrutiny.

TWA's no-motherhood policy in our opinion provides a clear example of sex discrimination prohibited by § 2000e-2(a). The Supreme Court, in applying that provision, has held that an employer may not refuse to hire women with pre-school-age children while hiring men with such children. *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971). TWA's policy discriminated in the same manner.

TWA next argues that its policy did not have a discriminatory effect. This argument is relevant. In Title VII cases, discriminatory effect becomes an issue when the employer has a facially neutral practice. In those cases, the plaintiffs can establish a prima facie case by proving that the practice has a discriminatory effect. *See Dothard* v. *Rawlinson*, 433 U.S. 321, 329 (1977). We need not reach that issue in the present case because TWA's policy was discriminatory on its face.

Finally, TWA argues that if its policy did discriminate on the basis of sex, the discrimination was a BFOQ rea-

sonably necessary to the normal operation of TWA's business. The BFOQ, often described as an exception to Title VII's general prohibition of sex discrimination, is, at least in the view of one commentator, more accurately designated as a justification for sex discrimination.[5] TWA argues that its no-motherhood policy, albeit discriminatory, was justified as a BFOQ because (1) mothers of young children would have unacceptably high rates of absenteeism, (2) mothers might be subject to overriding domestic concerns that would make them questionable risks for competent performance in times of crisis, and (3) mothers returning from maternity leaves of absence would require expensive retraining.

Our analysis of the BFOQ issue must begin with the Supreme Court's most recent pronouncement in *Dothard* v. *Rawlinson, supra* at 334.

> We are persuaded—by the restrictive language of § 703(e) [§ 2000e-2(e)], the relevant legislative history, and the consistent interpretation of the Equal Employment Opportunity Commission—that the bfoq exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex.

The Court, in a footnote, also stated that the EEOC's narrow construction of the statute, 29 C.F.R. § 1604.2 (a), can be given weight, 433 U.S. at 334 n. 19. The lower court interpretations of the BFOQ prior to *Dothard* are not entirely consistent.[6] In view of the Supreme

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[5] For a thorough discussion of the legislative history and the current judicial interpretations of the BFOQ, see Sirota, *Sex Discrimination: Title VII and the Bona Fide Occupational Qualification*, 55 Tel.L. Rev. 1025, 1027-33, 1042-50 (1977).

[6] *Compare Weeks* v. *Southern Bell Telephone and Telegraph Co.*, 408 F.2d 228 (5th Cir. 1969), *with Diaz* v. *Pan American World Airways, Inc.*, 442 F.2d 385 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971). *See also Usery* v. *Tamiami Trail Tours Inc.*, 531

Court's recent approbation of "an extremely narrow construction, we are of the opinion that the Ninth Circuit's construction is the most appropriate. In *Rosenfeld* v. *Southern Pacific Co.*, 444 F. 2d 1219 (9th Cir. 1971), that court stated that

> based on the legislative intent and on the Commission's interpretation, sexual characteristics, rather than characteristics that might, to one degree or another, correlate with a particular sex, must be the basis for the application of the BFOQ exception.

444 F. 2d at 1225. Thus, attributes that are culturally more common to one sex than the other are an insufficient basis for a BFOQ. Cultural stereotypes should not be employed to justify sex discrimination.

With this background, we now turn to the three issues which TWA argues present genuine issues of material fact on the BFOQ issue sufficient to defeat summary judgment. First, TWA argues that mothers, but not fathers, of young children would have an unacceptably high rate of absenteeism. They submit that absenteeism is a serious problem among flight attendants. This alone, of course, does not address the critical issue of whether female parents have a sexual characteristic different than male parents which would cause them to be absent more often. TWA, in an attempt to raise a genuine issue of material fact, points to the deposition of David J. Crombie, Vice-President of Industrial Relations at TWA, which states that problems of absenteeism have been exacerbated since TWA permitted mothers on flight duty. This is insufficient to defeat summary judgment because he does not attribute the increased absenteeism problem directly to the mothers. Indeed, he presents no evidence

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F.2d 224 (5th Cir. 1976). A perceptive analysis of these cases, as well as a comprehensive survey of developments in Title VII jurisprudence, is provided in Lopatka, *A 1977 Primer on the Federal Regulation of Employment Discrimination*, 1977 U. Ill. L. F. 69.

nor even states that mothers were absent more often than fathers, information, if it exists, that surely would be available to him.[7] TWA, in its brief, can only state that "[t]he airlines *could not be sure* that absenteeism among flight attendants with young babies would not increase greatly." [Emphasis added.] The whole tenor of its argument is speculative and relies heavily on stereotypical assumptions, a posture which is anathema to the maturing state of Title VII analysis.

TWA next argues that it raised a genuine issue of material fact as to a BFOQ in its allegation that mothers might be subject to overriding domestic concerns that would make them questionable risks for competent performance in times of crisis. In support of this allegation TWA primarily offers affidavits of Dr. L. G. Lederer, Corporate Medical Director of American Airlines, Dr. Charles C. Gullett, Corporate Director Medical Services & Safety Engineering for TWA, and the deposition of David J. Crombie.

Dr. Lederer's affidavit states that a mother's concern for her child, when combined with irregular hours and absences from home at distant locations, would produce psychological stresses which could impair the proper performance of her flight duties. This is insufficient to defeat summary judgment because he fails to contrast the potential effect on performance with that of fathers, the critical issue in this case. Indeed, within the same paragraph, Dr. Lederer states that frequent absences from home and irregular work hours as experienced by *firemen* and *salesmen* contributed to unstable marriages. Therefore, it is not at all clear that his conclusions regarding effects on performance are gender-related.

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[7] TWA terminated its no-motherhood policy in October 1970 and thus has had several years to assess the absenteeism problem of mothers *vis-a-vis* fathers, if such a problem exists, and to determine whether it is linked to a sex characteristic.

Dr. Gullett's affidavit includes statements similar to those of Dr. Lederer and accordingly fails to defeat summary judgment for the same reasons. Mr. Crombie's deposition similarly fails to raise a genuine issue of material fact. He stated in a conclusory fashion that "the mother of children *could* be so preoccupied with her cares that she *might* be deficient in the performance of those aspects of her job relating to safe transport. . . ." [Emphasis added.] Aside from our uncertainly as to Mr. Crombie's expertise to make such a judgment, we are not persuaded that his conclusions are not based on sex stereotyping that Title VII seeks to eliminate from the employment setting. As this court stated in *Sprogis* v. *United Air Lines, Inc.*, 444 F. 2d 1194, 1198 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971), § 703(a)(1) "subjects to scrutiny and eliminates such irrational impediments to job opportunities and enjoyment which have plagued women in the past." Furthermore, Mr. Crombie's statements do not address the question of whether mothers have a sex characteristic, different than fathers, that would impair their job performance to a greater extent. Characteristics that might, to one degree or another, correlate with a particular sex are insufficient to provide the basis for a BFOQ. *Rosenfeld* v. *Southern Pacific Co.*, *supra* at 1225. To accept Mr. Crombie's statements as sufficient to raise a genuine issue of material fact requires acquiescence in assumptions steeped in cultural stereotypes, such as that female parents have a more intense concern for their children than male parents, assumptions that are inconsistent with the purposes of the Act.

TWA's third argument to defeat summary judgment is that it raised an issue of fact as to the existence of a BFOQ by its allegation that mothers returning from maternity leaves would require expensive retraining. We are unpersuaded by this argument because it seems clear that the retraining mother returning from maternity

leave, albeit an expense to TWA, would be less expensive than training her replacement.

We have examined all the other relevant affidavits, depositions, and documents in the record and find them of no additional support to TWA's challenge to the district court's summary judgment. Accordingly, for the reasons stated herein, we hold that the district court properly granted summary judgment in favor of the plaintiffs.[8]

THE OCTOBER 15, 1976 ORDER

TWA moved to exclude certain persons from the plaintiff class for lack of subject matter jurisdiction. The class was defined as all female flight cabin attendants who were terminated from employment with TWA on or after July 2, 1965 for reasons of pregnancy.[9] TWA's motion sought to exclude from this class all those employees who were terminated more than 90 days prior to May 31, 1970, the date the original plaintiff class filed

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[8] Our decision to affirm the summary judgment here may appear inconsistent with language in *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542, 544 (1971), where the Court, in vacating and remanding a sex discrimination case stated that "conflicting family obligations, if demonstrably more relevant to job performance for a woman than for a man, could arguably be a basis for distinction under § 703(e) of the Act." This language, however, does not categorically state that such considerations, if proved, would constitute a BFOQ. Indeed, after *Dothard* v. *Rawlinson*, 433 U.S. 321, 334 (1977), in which the Court accepted an "extremely narrow" construction of the BFOQ, the court may well be unwilling to accept such considerations as sufficient to constitute a BFOQ. Furthermore, in *Phillips*, the defendant did not raise the BFOQ defense in the lower court and thus the issue was not directly before the Supreme Court.

[9] Since the pregnancy leave policy is not challenged, but rather the refusal to reinstate after a child is born, we assume the class includes only those who would have resumed flight duty after becoming a mother but for TWA's policy forbidding this.

its charge with the EEOC. TWA argues that these employees did not fulfill the jurisdictional requirement that a charge must be filed with the EEOC within 90 days after the alleged unlawful employment practice occurred. 42 U.S.C. § 2000e-5(d) (1970 ed.).[10]

The district court denied TWA's motion on the ground that the alleged unlawful employment practice was a "continuing violation" so that even though the termination may have occurred more than 90 days before the plaintiff class filed its charge with the EEOC, the no-motherhood policy, which caused not only termination, but also the failure to reinstate, continued into the 90-day period and itself constituted an unlawful employment practice which continued until TWA abandoned the policy in October 1970.

The continuing violation theory was created to add some flexibility to an otherwise rigid jurisdictional filing requirement that might often result in the denial of Title VII remedies to employees who have suffered employment discrimination. Although the purpose of the theory is admirable, an application of the theory in its broadest terms would vitiate the filing requirement which, as a jurisdictional prerequisite, also deserves proper respect. Accordingly, we must define the legitimate scope of this theory and determine whether TWA's conduct falls within it.

Courts which have applied the continuing violation theory have not addressed the precise issue in the present case. In *Cox* v. *United States Gypsum*, 409 F. 2d 289 (7th Cir. 1969), several female employees were laid off more than 90 days prior to filing charges with the

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[10] In 1972, this section was amended to extend the time limit to 180 days and was renumbered § 2000e-5(e). The amendment does not apply to the present case because these proceedings were initiated in 1970.

EEOC. They claimed a continuing violation on the basis that male personnel were hired to perform jobs which the plaintiffs were qualified to perform between the time plaintiffs were laid off and the time they filed their charges. This court held that although a charge filed more than 90 days after a layoff would be untimely, the plaintiffs' allegations suggested discriminatory recalls sufficient to show that the violation continued up to the filing of charges. 409 F. 2d at 290. *Accord, Macklin* v. *Spector Freight Systems*, 478 F. 2d 979 (D.C. Cir. 1973). *See also Bartmess* v. *Drewrys U.S.A., Inc.*, 444 F. 2d 1186, 1189 (7th Cir. 1971), *cert. denied*, 404 U.S. 939.

When the alleged unfair employment practice culminates in termination of employment rather than a layoff, courts have been unwilling to apply the continuing violation theory. In *Terry* v. *Bridgeport Brass Co.*, 519 F. 2d 806 (7th Cir. 1975), the plaintiffs filed their EEOC charge more than eleven months after they were terminated. This court, quoting an opinion of the Eighth Circuit, stated that

> to construe loosely "continuing" discrimination would undermine the theory underlying the statute of limitations. While the continuing discrimination theory may be available to present employees, . . . even though on layoff, . . . we do not think this theory has validity when asserted by a former employee.

519 F. 2d at 808. For this reason the court held that the EEOC charges were untimely filed and that the court consequently lacked jurisdiction.

The present case is distinguishable from *Cox* because it does not involve layoffs and from *Terry* because *Terry* did not involve the continuation of an articulated policy denying reinstatement for statement for discriminatory

reasons.[11] It is also distinguishable from the Supreme Court's recent opinion in *United Air Lines* v. *Evans*, 431 U.S. 553 (1977). In *Evans*, the plaintiff was terminated in 1968 because of United's no-marriage rule. United discontinued the rule in 1969 and the plaintiff was hired as a new employee in 1972. In 1973, she filed charges with the EEOC and argued that her employment in 1972 without seniority continued the discriminatory effects of the original termination. The Court responded that the hiring practices in 1972 were not discriminatory and that these hiring practices merely gave some present effect to past discrimination. Such "present effect" is not enough to state a claim under Title VII, however, and the Court stated that "the critical question is whether any present *violation* exists." 431 U.S. at 558 (emphasis in original). Whether any present violation would have existed had the plaintiff filed while the no-marriage policy was still effective or within 90 days of its discontinuation, was not decided and, in essence, is the issue before us now.[12]

Although, as we have indicated, there are no cases directly on point, we are unwilling to extend the continuing violation theory, as did the district court, so as to

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[11] This latter question of whether the continuation of a discriminatory policy which denies reinstatement constitutes a continuing violation was specifically left open by the Ninth Circuit. In *Collins* v. *United Air Lines, Inc.*, 514 F.2d 594 (9th Cir. 1975), the plaintiff was forced to resign under a "no-marriage" policy. The policy was then changed and three years later the plaintiff filed a charge with the EEOC. The court held the filing untimely, but specifically stated that it expressed no opinion concerning whether a charge filed within 90 days of the discontinuance of the no-marriage policy would have been timely. 514 F.2d at 596 n.2.

[12] Neither the EEOC nor the courts have construed *Evans* as eliminating entirely the continuing violation theory. *See* EEOC Interpretative Memorandum, 46 U.S.L.W. 2028 (July 19, 1977); *Caldwell* v. *Seaboard Coastline Railroad*, 435 F. Supp. 310 (W.D.N.C. 1977).

include in the plaintiff class those employees who were permanently terminated more than 90 days before the filing of EEOC charges. We attach significant weight to that point in time when the employment relationship is permanently severed, and we are not alone in this regard. In *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429 (D.C. Cir. 1976), the court stated in a similar Title VII class action context that

> [a] severing of the employment relationship ordinarily terminates a discrimination against the severed employee, and activates the time period for filing charges with the Commission concerning any violation which occurred at separation or which may have been continuing up to the date thereof. To hold otherwise would effectively read the timely-filing requirement out of the statute.

567 F.2d at 473. *Accord, Wetzel* v. *Liberty Mutual Insurance Co.*, 508 F.2d 239, 246 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975); *Terry* v. *Bridgeport Brass Co.*, *supra* at 808; *Collins* v. *United Air Lines, Inc.*, 514 F.2d 594, 596-97 (9th Cir. 1975). Arguably, the source for the continuing violation is not the termination itself, but the subsequent refusal to reinstate because of the same policy that led to the initial termination. We are of the opinion, however, that the terminations in the present case, which occurred pursuant to a policy which explicitly included a refusal to reinstate, are not meaningfully different than discriminatory terminations which do not articulate a policy of refusing reinstatement. In most cases in which an employee is discharged for discriminatory reasons, his or her opportunity for reinstatement is generally foreclosed for the same discriminatory reasons, but courts have required that employee to file an EEOC charge within 90 days after the termination. The addition of an articulated policy precluding reinstatement should not require a different rule. Therefore, it is the

continuity of the employment relationship that sustains the violation, and when that relationship is severed, the violation ceases.

Those employees in the present case who were terminated but reinstated in ground duty positions after their maternity leave pursuant to TWA's policy, are in a different position. These employees were properly included in the class because they were subject to a continuing violation. When they resumed employment after becoming a mother, the discriminatory violation, which lay dormant during their pregnancy, was revived; that they were forced to accept a presumably less preferable ground duty position while new employees were hired for flight duty revived the violation and rendered it as to them a continuing one. The position of these employees is closely analogous to the layoffs followed by discriminatory recalls held to be continuing violations in *Cox* and *Macklin*, both *supra*. It is also analogous to a discriminatory failure to promote, held to be a continuing violation in *Clark* v. *Olinkraft, Inc.*, 556 F.2d 1219, 1223 (5th Cir. 1977), *cert. denied*, 46 U.S.L.W. 3527 (Feb. 21, 1978). *See also Caldwell* v. *Seaboard Coastline Railroad*, 435 F. Supp. 310 (W.D.N.C. 1977). Every time TWA hired a new flight cabin attendant, instead of transferring one of the former stewardesses now on ground duty, it perpetuated the initial violation.

The distinction we have drawn between those terminated employees who returned to employment in ground duty positions and those who did not renew the employment relationship is a delicate but nonetheless important one. The returning employee remains within the ambiance of a continuing relationship of employment and supervision and thus is directly subject to the employer's discriminatory actions. The non-returning employee is outside this ambiance and thus feels at most only the indirect reverberations of those actions. Although the non-

returning employee who did not desire to remain as a TWA employee in a non-flight position may arguably suffer some form of discrimination whenever the employer hires a new flight cabin attendant instead of reinstating the terminated employee, the discriminatory impact is diffuse and uncertain. Permanent severance of the employment relationship destroyed the ties through which the direct impact of discrimination may be transmitted.

TWA points out with some cogency the inherent difficulties of determining back pay if all members of the class were found entitled to prove what TWA characterizes as "these stale claims": each claim will require adjudication of whether termination was for any reason other than discrimination; a claimant may not recover if she was guilty of concealment of pregnancy; she may not recover if she left work for family reasons; amounts earned or earnable with reasonable diligency by each claimant in other work during recoverable years must be determined in order to reduce back pay under the express provisions of § 706(g); and the evidence concerning the individual and personal facts of hundreds of these claims is sure to be vague and unreliable.

While all of these aspects may be true, we do not deem that difficulty of ascertainment per se is a ground for denying relief where it is legally due. Nevertheless, we cannot put this factor entirely aside in determining the Congressional intent in requiring claims to be litigated only if filed with the EEOC within 90 days after the alleged unlawful employment practice occurred.

We hold therefore that the class members who satisfy the jurisdictional 90 days filing requirement are those employees who were terminated permanently[13] during

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[13] The proper time for the 90-day period to begin to run is the time of *permanent* termination. Although TWA argues other-

the 90 days prior to the filing of EEOC charges and those employees who were removed from flight duty on or after July 2, 1965 and before the filing of EEOC charges but who were reinstated in ground duty positions and who continued their employment into the 90-day period. While we might rather safely assume that those employees who returned to work in a ground capacity would have preferred to reassume the literally and figuratively higher status of cabin attendants, nevertheless it is not a necessarily true conclusion and therefore these employees must also show that during the 90-day period they were qualified to and would have accepted flight duty had it not been for TWA's policy.

As to those employees who have failed to file timely charges with the EEOC, who were terminated more than 90 days before filing of EEOC charges and who did not resume employment in ground duty positions, we must now consider whether the employer waived this timeliness defense by failing to plead it affirmatively in its answer. There is no dispute that the employer failed to raise this issue in the pleadings. The critical issue is whether the 90-day period is in the nature of a statute of limitations in which case the doctrines of waiver and estoppel would apply, or is a jurisdictional prerequisite to suit in which case the employer could raise it at any time.[14] We hold the 90-day filing period to be jurisdictional and therefore the employer's failure to plead it did not constitute a waiver.

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wise, we interpret the effect of its policy as resulting in permanent termination when a child was born or adopted. Prior to that time the severance from employment was in actuality a mandatory maternity leave. This is apparent from the fact that a pregnant employee was free to resume employment in flight duty after a miscarriage or in ground duty after childbirth.

[14] Fed. R. Civ. P. 12(h)(3); *United States* v. *Griffin*, 303 U.S. 226, 229 (1938).

The language of the statute is clear:

> A charge under subsection (a) of this section *shall be filed* within ninety days after the alleged unlawful employment practice occurred.

42 U.S.C. § 2000e-5(d) (1970 ed.) (emphasis added).[15] Furthermore, having examined the legislative history of this provision, of which there is very little, we find nothing of significance to indicate that the 90-day filing requirement is not jurisdictional. *But cf. Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 475 n. 345 (D.C. Cir. 1976). In *Terry* v. *Bridgeport Brass Co., supra*, the plaintiffs' Title VII suit was dismissed in the district court because they failed to file charges with the EEOC within 90 days of the alleged unfair employment practice. On appeal, this court affirmed the dismissal stating that "[t]he district court therefore correctly concluded that the charges were untimely filed and that it consequently lacked jurisdiction." 519 F.2d at 808.[16] Moreover, the

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[15] *See* note 10 *supra*.

[16] *See also Gibson* v. *Kroger Co.*, 506 F.2d 647, 650 (7th Cir. 1974), *cert. denied*, 421 U.S. 914 (1975); *Moore* v. *Sunbeam Corp.*, 459 F.2d 811, 821 n.6 (7th Cir. 1972); *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 718 (7th Cir. 1969); *Choate* v. *Caterpillar Tractor Co.*, 402 F.2d 357, 359 (7th Cir. 1968).

Other circuits are split on this issue. *See, e.g., Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 475 (D.C. Cir. 1976); *Dartt* v. *Shell Oil Co.*, 539 F.2d 1256 (10th Cir. 1976), *aff'd per curiam by an equally divided Court*, 46 U.S.L.W. 4021 (Nov. 29, 1977); *Wetzel* v. *Liberty Mutual Insurance Co.*, 508 F.2d 239, 246 n.8 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975); *East* v. *Romine, Inc.*, 518 F.2d 332, 336-37 (5th Cir. 1975); *Reeb* v. *Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 928-29 (5th Cir. 1975); *Olson* v. *Rembrandt*, 511 F.2d 1228, 1231 (8th Cir. 1975).

Olson was the 8th Circuit case quoted in *Terry*. We have earlier in this opinion quoted from *Terry* in connection with the discussion of the continuing violation issue. We note that the 8th Circuit did refer to "the statute of limitations" in the *Olson* opinion. *Terry*, however, clearly proceeded on the basis of jurisdiction.

Supreme Court has, on several occasions, referred to the 90-day filing requirement as a jurisdictional prerequisite. *See United Air Lines, Inc.* v. *Evans*, *supra* at 555 n.4; *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798 (1973). Therefore, the employer's failure to raise the filing requirement earlier does not constitute a waiver, nor is the employer estopped from raising it.

The plaintiffs argue that the employer's statements at a March 17, 1972 settlement hearing constitute an express waiver of the filing requirement issue. Although it is questionable whether any concessions made at a settlement hearing should be held to constitute a waiver when the settlement is subsequently overturned, we need not reach this question as our conclusion that this filing requirement was jurisdictional precludes a finding of waiver.

Plaintiffs also argue that the employer should be estopped from raising the filing requirement because the employer failed to raise it during the many lengthy proceedings which preceded the employer's motion to amend its answer to raise the issue. Plaintiffs characterize this conduct as "playing fast and loose with the courts," and contend that such conduct is grounds for estoppel. We do not condone the employer's delay in raising the jurisdiction issue, but neither do we accept the plaintiffs' argument that the delay should estop TWA from raising subject matter jurisdiction. The cases plaintiffs cited in support of their estoppel theory either did not involve subject matter jurisdiction, *Alger* v. *Hayes*, 452 F.2d 841 (8th Cir. 1971), or involved a situation in which the defendant pleaded lack of jurisdiction in its answer, then filed a stipulation admitting jurisdiction, and then two years later, after the statute of limitations had run on the plaintiff's claim, attempted to raise the same jurisdiction issue it initially pleaded. *DiFrischia* v. *New*

York Central Railroad Co., 279 F.2d 141 (2d Cir. 1960).[17] None of these cases, therefore, supports an estoppel argument in the present case.

Accordingly, for the reasons stated here, we vacate the October 15, 1976 order and remand to the district court for further proceedings consistent with this opinion. The parties shall bear their respective costs.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[17] This case has been limited in its application to its unusual facts. *See, e.g., Joyce* v. *United States*, 474 F.2d 215, 218 n.1 (3d Cir. 1973).

RELEVANT EXCERPTS FROM TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. § 2000e ET SEQ.

Section 703(h), 42 U.S.C. § 2000e-2(h):

> Notwithstanding any other provisions of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.

Section 706(d), 42 U.S.C. § 2000e-5(d) (1970):*

> A charge under this section shall be filed within ninety days after the alleged unlawful employment practice occurred. . . .

Section 706(g), 42 U.S.C. § 2000e-5(g):

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. . . .

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* The time period is now 180 days and is found in § 706(e) under the 1972 amendments.

EXCERPTS FROM ARTICLE III OF THE CONSTITUTION OF THE UNITED STATES

ARTICLE III.—THE JUDICIARY

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

* * * *

Section 2, Clause 1. Jurisdiction of Courts

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between

a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

RULE 82 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Jurisdiction and Venue Unaffected

These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. An admiralty or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, U.S.C. §§ 1391-93.

RULE 23(e) OF THE FEDERAL RULES OF CIVIL PROCEDURE

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

RULE 16(e) OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

(e) Rehearings Sua Sponte Before Decision. A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court or create a conflict between or among circuits shall not be published unless it is first circulated among the active members of this court and a majority of them do not vote to rehear in banc the issue of whether the

position should be adopted. In the discretion of the panel, a proposed opinion which would establish a new rule of procedure may be similarly circulated before it is issued. When the position is adopted by the panel after compliance with this procedure, the opinion, when published, shall contain a footnote worded, depending on the circumstances, in substance as follows:

> This opinion has been circulated among all judges of this court in regular active service. (No judge favored, or A majority did not favor) a rehearing in banc on the question of (e.g., overruling Doe v. Roe).

EXCERPTS FROM THE COLLECTIVE BARGAINING AGREEMENT BETWEEN TRANS WORLD AIRLINES, INC. AND THE INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS, SIGNED OCTOBER 11, 1978

ARTICLE 20

SENIORITY GENERAL

(A) Seniority shall begin to accrue from the date of employment as a Flight Attendant and shall continue to accrue during such period of employment as a Flight Attendant except as otherwise provided in this Agreement. When Flight Attendants have equal seniority, their relative seniority shall be determined on the basis of their length of employment with the Company, or if the length of their Company employment is equal then their surname shall be listed in order of age as determined by date of birth as shown in the Company's personnel records (the oldest of them being listed first, the next oldest second, etc.). As to those Flight Attendants who are assigned to the line on or after July 1, 1976, if the length of Company employment is equal as between two Flight Attendants, then

their surname shall be listed upon the seniority list on the basis of the last four (4) digits of the Flight Attendants social security number, with the Flight Attendant with the lowest last four (4) digits being deemed the senior.

(B) Seniority shall govern all employees in case of furlough due to reduction in forces, re-employment after furlough, (subject to Article 12(G)) choice of vacancies, and preference of assignment to equipment, provided the employee is deemed sufficiently qualified by the Company for the operation involved, except that the term "sufficiently qualified" as used herein shall be applied the same as it was on July 31, 1969. In addition, qualifications or lack thereof on any equipment will not be used as a basis for denying seniority in cases of bidding or reduction in force. If a Flight Attendant bids and is awarded a line of time on equipment on which such Flight Attendant is not qualified, the provisions of Articles 6-A(F) or 6-B(G) will apply during such training. In the event a senior employee is not considered sufficiently qualified, the Company will, upon request, discuss the matter with the employee and furnish reasons therefor, in writing.

* * * *

(F) Any employee who resigns or who is dismissed from the service of the Company shall thereupon forfeit all previously accrued seniority, and the employee's name will be removed from the seniority list(s).

ARTICLE 12

REDUCTION IN FORCE AND RECALL

(F) Employees furloughed due to a reduction in force on return to duty within three (3) years from the furlough date, shall be allowed, for seniority pur-

poses but not for purposes of determining future pay rate, all time accrued prior to returning to duty. At the end of three (3) years after the date of furlough, the furlough shall expire and the employee's name shall be removed from the seniority list(s).

(G) Flight Attendants who have been furloughed or displaced or who have displaced into a lower classification will be recalled in seniority order to the classification from which furloughed or displaced prior to the processing of all other bids on file. Furloughed Flight Attendants shall, upon notice of recall, indicate in order of preference those domiciles to which they will accept assignment. Assignments to domiciles will then be made in seniority order from among those Flight Attendants being recalled and those Flight Attendants who have standing bids on file. The priority of recall to the classification(s) will apply only to the first available vacancy offered in the classification(s) to the furloughed or displaced employee.

Supreme Court
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No. 80-951

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Petitioner,

vs.

TRANS WORLD AIRLINES, INC.,

Respondent,

and

ANNE B. ZIPES, PATRICIA A. SANTINI, and PAMELA J. DAILING, individually and on behalf of a class,

Respondents.

BRIEF OF TRANS WORLD AIRLINES, INC., OPPOSING CERTIORARI PETITION TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JAMES A. VELDE,
One First National Plaza,
Chicago, Illinois 60603,
(312) 726-2452
Counsel of Record for Trans World Airlines, Inc.

Of Counsel:
LAURENCE A. CARTON,
GARDNER, CARTON & DOUGLAS,
One First National Plaza,
Chicago, Illinois 60603
(312) 726-2452

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Respondents.

BRIEF OF TRANS WORLD AIRLINES, INC., OPPOSING CERTIORARI PETITION TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Trans World Airlines, Inc., urges the denial of certiorari, permitting the termination of this ten-year litigation. The petitioner union, representing in excess of 6,000 flight attendants of TWA, seeks to invalidate (1) a settlement agreement, approved by both lower courts, that compromises a class action brought against TWA in 1970 under Title VII of the 1964 Civil

Rights Act and (2) an allowance of retroactive occupational seniority to employees who are to be reinstated under the agreement. The objection to the seniority allowance does not involve TWA because the settlement agreement provides that seniority is to be determined by the district court "in its discretion ... without contest or objection by TWA" (App. 21a).[1] But TWA strongly opposes the union's attack on the district court's subject matter jurisdiction that would destroy the whole settlement.

The union's contention is that the district court had no jurisdiction to approve the settlement of the Sub-class B claims which the court of appeals had held were barred by a jurisdictional time limit of Title VII. The union concedes (pet. p. 9 n11) that the claims of Sub-class A members, who had been held to have complied with the time limit, were within the court's jurisdiction to approve the settlement. As this brief shows, the union's argument is wrong in legal principle and would have bad practical results.

Three background facts are significant.

1. This Court denied review of a similar settlement approval in a companion case, *ALSSA* v. *American Airlines*, 573 F. 2d 960 (7th Cir.), *cert. den.* 439 U.S. 876 (1978). The union contends that the *American* case conflicts with a decision in *McArthur* v. *Southern Airways, Inc.*, 569 F. 2d 276 (5th Cir. 1978), and differs from the present *TWA* case. As this brief shows, the *McArthur* case in the Fifth Circuit differs from both the *American* and this *TWA* case.

2. If the union's objection to the settlement approval order were sustained, this Court could be required to consider the review of the related Seventh Circuit decision which held that TWA's pregnancy practice was unlawful sex discrimination under Title VII and that the Sub-class B class members had not complied with the jurisdictional time limit of Title VII. *In Re*

[1] The citations "App.____" in this brief are to the appendix in the union's petition for certiorari.

Consolidated Proceedings in the Airline Cases, 582 F. 2d 1142, became final on January 11, 1979 on denial of rehearing. After petitions for certiorari were filed here in Nos. 78-1545 and 1549, the parties entered into settlement negotiations in May 1979, and this Court on June 4, 1979 deferred consideration of the certiorari petitions on the joint motion of the parties. The settlement agreement now attacked by the union was entered into on June 18, 1979. It settled all issues in the litigation and provided for dismissal of the certiorari petitions when the settlement approval order is no longer subject to review or modification. This final event will occur if this Court denies the union's certiorari petition in No. 80-951. The parties will then be required to dismiss the petitions in Nos. 78-1545 and 78-1549. And they can then carry out the settlement agreement and terminate the litigation begun in 1970. If certiorari is granted for review of the settlement approval order, the reasons for deferring consideration of the petitions in Nos. 78-1545 and 78-1549 will continue to exist until this Court's final decision in this certiorari proceeding.

3. The union's contentions would result in the disapproval of the settlement on an issue that has greatly protracted this litigation. TWA abandoned in 1970 the practice that was the cause of the litigation. The *failure* of a 1971 settlement to provide retroactive occupational seniority for terminated flight attendants was the issue on which the settlement approval was overturned years ago. *ALSSA* v. *American Airlines, Inc.*, 490 F. 2d 636 (1973), *cert. den.* 416 U.S. 993 (1974). The 1971 settlement would have put the class plaintiffs back to work at that time and given them work in the intervening years, although only with the seniority of their termination. Now the *allowance* of retroactive seniority in the 1979 settlement agreement is the union's reason for seeking to overturn it. It would be a misfortune if the dispute over the issue of seniority were to prevent the compromise of larger issues. The contested issue of time requirements in this litigation was discussed by the court of appeals as follows (App. 7a-8a):

The uncertainty of the outcome on this issue before the Supreme Court was considered by the district court to be a major factor leading the parties to reach this settlement, to avoid "the plaintiff class and T.W.A. being forced against their will to continue a legal battle before the Supreme Court in a winner-take-all contest which neither party desires to risk."

The facts are clarified by a chronology of the major relevant events in the litigation:

1970	Flight attendants' union filed separate but companion Title VII class actions against American Airlines and Trans World Airlines attacking rule terminating flight attendants on pregnancy (Aug.).
	Pregnancy rule eliminated by both airlines (Oct.).
1971-1974	Settlement agreement providing return to work without back pay or retroactive seniority was set aside by court of appeals' reversal of district court approval order. *ALSSA* v. *American Airlines,* 490 F. 2d 636, *cert. den.* 416 U.S. 993 (May 1974).
1976	Summary judgments were entered against American (Apr.) and TWA (Oct.), each holding Title VII was violated by airline and Title VII time limit was complied with by plaintiffs.
1977	Joint American-TWA brief on appeal was filed in Seventh Circuit (May).
	Settlement between class plaintiffs and American was negotiated and approved in District Court (Aug.-Sept.).
1978	TWA's appeal from summary judgment and union's appeal from American settlement approval was argued in court of appeals (Jan.).
	Approval of American settlement was affirmed. *ALSSA* v. *American Airlines,* 573 F. 2d 960 (March), *cert. den.* 439 U.S. 876 (Oct.).

Court of Appeals affirmed summary judgment of violation of Title VII by TWA, but Sub-class B plaintiffs were held to have failed to comply with Title VII time limit. *In Re Consolidated Pretrial Proceedings in the Airline Cases,* 582 F. 2d 1142 (Aug.). App. 40a-58a.

1979 Court of appeals denied petitions for rehearing (Jan.).

Plaintiffs filed certiorari petition No. 78-1545, and TWA filed cross certiorari petition No. 78-1549 (Apr.).

On motion of parties, Supreme Court deferred ruling on certiorari petitions because of settlement negotiations (June 4).

Settlement agreement was entered into (June 18) between plaintiffs and TWA, reinstating class members as flight attendants; TWA agreeing to pay $1,500,000 to Sub-class A members (held to have complied with time limit) and $1,500,000 to much larger Sub-class B (held not to have complied with time limit); and providing for seniority to be determined by court in its discretion without contest or objection by TWA. App. 23a-39a.

Union granted leave to intervene (July 19).

District court entered (1) an order approving settlement as fair, reasonable and adequate, dismissing actions, and (2) an order awarding retroactive seniority to employed class members (Nov. 9). App. 16a, 18a.

1980 On union appeal, court of appeals affirmed orders approving settlement and granting seniority (June). App. 1a.

Court of appeals denied union petition for rehearing (Sept.). App. 11a.

Union's certiorari petition filed (Dec. 13).

SUMMARY OF ARGUMENT

Litigation can be settled while subject matter jurisdiction is in dispute. When the order approving the settlement is no longer subject to court review, the court of appeals' non-final decision will become moot.

Judicial and Congressional policies favor the compromise settlement of Title VII cases, particularly where the outcome of the jurisdiction issue is in doubt. These policies are stronger than the union's rigid jurisdictional theory.

Previous court approval of a similar settlement in a companion case supports approval of this settlement. There is no conflict between the circuits.

REASONS FOR DENYING CERTIORARI

The district court and court of appeals were clearly right in rejecting the union's jurisdictional attack on the settlement. Several preliminary matters emphasize the practical as well as theoretical reasons for denying certiorari.

A central consideration now is the settlement of this protracted litigation. The backpay claims of the Sub-class B members, rejected by the court of appeals for noncompliance with the jurisdictional time limit, cover more than ten years at annual rates of at least $7,500, amounting to an exposure of over 30 million dollars. Those claims were settled for 1.5 million plus return to work and trip passes for non-returning class members (App. 32a). When the settlement was agreed to, the issues of TWA's liability and of class plaintiffs' noncompliance with the jurisdictional time limit were still in dispute in the certiorari petitions (Nos. 78-1545 and 1549) filed in the Supreme Court. The union representing current employees was permitted, under *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), to intervene and demonstrate, if it could, that the allowance of seniority would have "unusual adverse impact" on current employees and should be denied. The settlement resolved substantial issues, contested by the parties since 1970, in the practical interest of re-employing the plaintiffs and terminating the litigation and TWA's large financial risks.

The description of the court of appeals decision in the union's petition (7-8) omits a crucial factor. The court of appeals explained that the issue of subject matter jurisdiction over Sub-class B claims had not been "settled with finality" since the court of appeals' decision was pending before this Court at the time of the settlement (App. 7a). A reversal of the court of appeals ruling by the Supreme Court would mean that there was complete subject matter jurisdiction. The issue thus presented is not, as the union repeatedly represents, whether

there can be a settlement when subject matter jurisdiction is irreversibly held to be lacking. The question is whether litigation can be settled while subject matter jurisdiction is in dispute. This issue, not faced in the union's petition, materially differentiates *McArthur* v. *Southern Airways, Inc.*, 569 F. 2d 276 (5th Cir. 1978), which the union petitioner claims to be a conflicting decision that justifies Supreme Court review.

The union's petition repeatedly states that the allowance of retroactive seniority violates its collective bargaining agreement with TWA. Many Title VII decisions have indicated that Title VII and the policies under it supersede the provisions of union agreements. See *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 447 (D.C. Cir. 1976); *U.S.* v. *N. L. Industries, Inc.*, 479 F.2d 354, 379 (8th Cir. 1973).

The union seeks priority for litigation over settlement by contending (pp. 16-17) that the Court should grant certiorari in this No. 80-951 and decide the district court's jurisdiction over the claims of the Sub-class B members. This issue is before the Court in the pending certiorari proceeding of the Sub-class B members in No. 78-1545 but where, under the Court's order of June 4, 1979, consideration of the issue is held in abeyance because of the settlement. The union would have the Court disregard the stay order in No. 78-1545 and hold up consideration of the settlement approval order in this No. 80-951. This result would defeat the judicial policy in favor of settling litigation.

I.

DISTRICT COURT HAD JURISDICTION TO CONSIDER AND APPROVE SETTLEMENT.

Subject matter jurisdiction of this action against TWA is provided for by several statutory provisions. The complaint, alleging a class action under Title VII of the Civil Rights Act of 1964, stated that jurisdiction was invoked pursuant to four cited provisions of the United States Code. Complt. par. 1, I Supp. App. 7. One provision gives each district court jurisdiction of actions under Title VII. § 706(f) of Title VII, 42 USC 2000(e)-5(f). Another cited section, § 1343 (4) of the Judicial Code, gives district courts original jurisdiction of a civil action of the kind alleged in the complaint. Jurisdiction for consideration and approval of a settlement in a Title VII or other class action is provided by Rule 23(e) of the Federal Rules of Civil Procedure, stating that a class action shall not be "dismissed or compromised without the approval of the court". The contested issue of subject matter jurisdiction in this case is raised by the allegations of the complaint (par. 11) that the plaintiff union on June 1, 1970 had filed a charge with the Equal Employment Opportunity Commission alleging unfair employment practices and that the EEOC had notified the plaintiff it was entitled to initiate a civil action under Title VII. Section 706(d) of Title VII, which required such charges to be filed within 90 days after the occurrence of the alleged unlawful practice, is held to create a prerequisite of subject matter jurisdiction.[2]

These provisions constitute a jurisdictional foundation for the approval of the settlement of this class action under Title VII. Such a settlement is expressly encouraged by Congress in Title VII, which requires charges to be filed with the EEOC in the expectation that conciliation may dispose of the dispute.

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[2] See *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798 (1973); *United Air Lines* v. *Evans*, 431 U.S. 553, 555 (1977).

§ 706(d). The reasons of public policy for such a settlement are based on the intention of Congress in Title VII. *Alexander* v. *Gardner-Denver,* 415 U.S. 36, 44, 59 (1974). *ALSSA* v. *American Airlines,* 455 F. 2d 101, 109 (7th Cir. 1972). While the statutory provisions for subject matter jurisdiction must be complied with, their effect is modified to an appropriate extent by the strong Congressional policy in favor of the settlement of actions under Title VII. On this ground alone, the district court's approval of the settlement should not be invalidated by the union's jurisdictional argument. This conclusion is supported by further analysis of the question of jurisdiction.

A. Court of appeals' non-final decision on lack of jurisdiction did not deprive district court of jurisdiction over the settlement.

The union's attack on the district court's jurisdiction overlooks the fact that the court of appeals' non-final decision of lack of jurisdiction will become moot and of no effect when the settlement is carried out. The settlement agreement provides that, upon approval of the settlement, the action will be dismissed in the district court and that the petitions for certiorari in the United States Supreme Court, held in abeyance during the settlement proceeding, will be dismissed immediately after the order of approval "becomes final and no longer subject to court review". App. pp. 25(a), 35 (a). Under the usual procedure of the Supreme Court, when litigation is settled after certiorari has been filed, the judgment of the court of appeals is vacated and the case is remanded to the district court to dismiss the appeal as moot. *J. Aron & Co.* v. *Mississippi Shipping Co.,* 361 U.S. 115 (1959); *U.S.* v. *Munsingwear, Inc.* 340 U.S. 36, 39 (1950). The purpose of this practice, it was explained, is "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences" (340 U.S. at 41). Thus, the court of appeals' decision of lack of jurisdiction will become immaterial, without "any legal consequences", when the order approving the settlement is no longer subject to review.

The conclusion is clear. The court of appeals' to-be-vacated decision of lack of jurisdiction will not undercut the district court's jurisdiction to consider and approve the settlement.

B. Jurisdiction Over Sub-Class A Claims Provides Jurisdiction for Settlement.

The union concedes that the district court had jurisdiction to approve the settlement of the claims of Subclass A plaintiffs (pet. p. 9, n11). They were held by the court of appeals to have complied with the Title VII time limits. The provisions of the settlement agreement made up one intra-related package so that jurisdiction to consider settlement of the Sub-class A claims gave the court power to consider the Sub-class B claims. In a decision cited by the union (pp. 12-13) for the general principle of subject matter jurisdiction, the Seventh Circuit held that federal diversity jurisdiction existed for class claims under $10,000 if some of the claims individually satisfied the jurisdictional minimum. *Patterson* v. *Stovall,* 528 F. 2d 108, 112n5 (7th Cir. 1976).

C. Union's Rigid Jurisdictional Theory Not Applicable to Settlement of Title VII Class Action.

The union's petition cites cases (pp. 12-13) for the traditional results of lack of subject matter jurisdiction, as that jurisdiction may not be consented to or waived by the defendant, an action must be dismissed at once when lack of jurisdiction is found, any judgment in the action must be vacated, etc. So the union argues that, giving full effect to the Sub-class B members' failure to comply with the jurisdictional prerequisites of Title VII, the district court had no jurisdiction to approve a settlement that included their claims. The union's rigid argument overlooks the fact that *two policies of settlement and jurisdiction, as provided for by Congress in Title VII,* are involved and that the settlement policy is much stronger in this case.

Here the traditional judicial policy in favor of settlements is strengthened by the Congressional encouragement of settlements in Title VII cases, as noted above (p. 9), and by the provision for the settlement of class actions in Rule 23(e) of the Federal Rules of Civil Procedure. Rule 23(e) imposed a new requirement in stating that a class action shall not be dismissed or compromised without court approval. Other litigation is traditionally settled by the agreement of the parties, often without any court action except dismissal of the action pursuant to an unexplained stipulation. Whether the court dismissing the action lacks jurisdiction or whether lack of jurisdiction affects the settlement is of no consequence. In a class action the court's determination of approval depends on the reasonableness of the settlement. But lack of jurisdiction over the action being settled might have little or no effect on the court's jurisdiction to approve the settlement if the policy favoring settlements has priority.

The jurisdictional policy, which requires compliance with Title VII time limits in order to protect the courts from litigation over stale claims as noted above (p. 9), is not as strong as the union contends. It is true that time limit noncompliance excludes class members even when raised for the first time on appeal. *Wetzel* v. *Liberty Mutual Ins. Co.* 508 F. 2d 239, 248 n8 (3d Cir. 1975), *cert. den.* 421 U.S. 1011. But the principle's effect has been mitigated by permitting class members to be included in an EEOC charge filed by only one class member. *Albermarle Paper Co.* v. *Moody,* 422 U.S. 405, 414 n8 (1975). Some decisions have held that equitable considerations excused noncompliance with time limits in Title VII and similar litigation. *Reeb* v. *Economic Opportunity Atlanta,* 516 F. 2d 924, 930 (5th Cir. 1975); *Dartt* v. *Shell Oil Co.,* 539 F. 2d 1256, 1261-2 (10th Cir. 1977), affirmed by equally divided court, 434 U.S. 99. And the courts long ago modified the very strict rule that a judgment is absolutely void if the court lacked subject matter jurisdiction. For practical reasons, courts have sometimes sustained such a judgment in the interest of the finality of court

decisions. *Stoll* v. *Gottlieb*, 305 U.S. 165 (1938); *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371 (1940). See *Restatement of the Law, Second, Judgments*, Tentative Draft No. 6 (1979) 149-153.

Thus it is clear why the settlement policy has priority over that of jurisdiction. For in the instant case according to the court of appeals, the uncertainty of the outcome on the time limit issue "before the Supreme Court was considered by the district court to be a major factor leading the parties to reach this settlement" (App. 8a).

A class action settlement in a Title VII case can avoid very complex litigation created, as here, by the unusual jurisdictional prerequisites of Title VII. Since compliance with the filing prerequisites is necessary for subject matter jurisdiction, a great variety of disputed facts may be involved in the court's jurisdiction because of the circumstances of the claimed compliance. This is shown by the multitude of federal court decisions on the filing requirements.

It would be inconsistent with the purposes of Title VII and the strong judicial policy favoring settlements for the courts to hold that a disputed compliance with Title VII filing requirements cannot be settled because of their jurisdictional nature. The dispute over compliance would prevent the settlement of extensive litigation that might take years to resolve otherwise. The judicial policy against proceeding with litigation when subject matter jurisdiction may be lacking is clearly outweighed in this situation by the judicial policy that favors the settlement of Title VII cases.

The union argues that lack of jurisdiction for the settlement cannot be waived just as the employer cannot waive noncompliance with the jurisdictional prerequisites. However, the situations are not analogous. The strong judicial policy requiring subject-matter jurisdiction, by preventing waiver through failure to contest jurisdiction, is intended to reduce the burden of litigation as is the strong judicial policy favoring the settlement of disputes.

Here the conflict with strict jurisdictional theory is the policy of Congress and the courts that favors the compromise settlement of litigation, especially under Title VII. This practical settlement policy greatly outweighs in this case the policy behind the jurisdictional prerequisites of Title VII and refutes the union's contention that the settlement is invalid.

II.

AMERICAN AIRLINES SETTLEMENT DECISION SUPPORTS APPROVAL OF TWA SETTLEMENT, AND FIFTH CIRCUIT'S McARTHUR DECISION IS NOT IN CONFLICT.

The union contends that its jurisdictional contention is not contrary to *ALSSA* v. *American Airlines*, 573 F. 2d 960 (1978), *cert. den.* 439 U.S. 876, and is supported by *McArthur* v. *Southern Airways, Inc.*, 569 F. 2d 276 (5th Cir. 1978). Both cases were decided in March 1978. The losing union in *American* sought certiorari, which was denied, but certiorari was not sought in *McArthur*. The union misconceives the holdings in both cases, for the *TWA* decision involved here is supported by the *American* holding and does not conflict with the Fifth Circuit's decision in *McArthur*.

The court of appeals' opinion in the present case was right in saying, of the union's contention on jurisdiction, that the court had "rejected a similar claim in a lawsuit related to this case", citing the decision on the *American* settlement (App. 5a). The Title VII actions attacking the pregnancy practice of American and TWA for flight attendants were filed together on August 1, 1970. They were assigned to the same district judge. The *American* settlement, negotiated in August 1977, and that of *TWA*, negotiated in June 1979, have been described by the court of appeals as "similar" (*id.*). In the *American* case, as in the petition for certiorari in the *TWA* case, the petitioner union contended that the settlement could not be approved unless each plaintiff proved compliance with the jurisdictional time limit of Title VII. The major reliance of the unions in both

cases has been and is based on a statement in *United Airlines* v. *Evans*, 431 U.S. 553 (1977), that a discriminatory act not made the basis of a timely charge "is the legal equivalent of a discriminatory act which occurred before the statute was passed." See certiorari petition No. 77-1758, p. 6; petition in present case, pp. 11, 26.

The union's jurisdictional argument was rejected by the court of appeals in affirming the settlement in the *American* case, 573 F. 2d at 963. The opinion explained that the *Evans* holding about noncompliance with the time limit was not applicable because the court of appeals was "reviewing the propriety of a settlement and not a judgment rendered after a trial;" and that the issue raised by the union "should not be decided on the basis of Title VII law, but rather must be decided on the basis of legal principles regarding judicial review of settlement agreements." This Court denied the certiorari petition of the union in the *American* case in October 1978. 439 U.S. 876. The holding on the *American* settlement became a precedent for the negotiation of the *TWA* settlement entered into in June 1979.

The *McArthur* decision in the Fifth Circuit did involve charges of sex discrimination by flight attendants against an airline under Title VII and their failure to comply with the Title VII time limit. But the crucial facts and the jurisdictional principle involved were different from those in the *American* and *TWA* decisions in the Seventh Circuit as shown by a first *McArthur* opinion reported at 556 F. 2d 298. A class action was brought by twelve named plaintiffs, but they withdrew the class action allegations and entered into a consent decree with the defendant that would hire them back with full retroactive seniority in return for a complete dismissal of the action. Possible additional class members were thus excluded. The consent decree was used to evade the class action requirements of Rule 23 and the requirement of Rule 23(e) for court approval. In this first decision, the court of appeals ruled that the district court should proceed as under Rule 23(e) with

notice to class members and court consideration of the compromise. However, before the mandate issued, the Supreme Court's decision in *Evans* showed that none of the twelve plaintiffs had complied with the time limit requirement of Title VII. In the second opinion cited by the union, 569 F. 2d 276, the Fifth Circuit cut short the proceeding by directing the vacation of the consent decree for lack of jurisdiction.

Major differences between *McArthur* and the Seventh Circuit decisions in the *American* and *TWA* cases include:

1. All twelve plaintiffs in *McArthur* admitted that none had complied with the Title VII time limit. Their brief even conceded they would not have brought the action if *Evans* had been decided before they filed it. 569 F. 2d at 376, n. 3. In these *American* and *TWA* cases, compliance with the Title VII time limit remained in dispute at the time of the settlements and was one of the important issues that gave rise to the compromise.

2. The *McArthur* case was disposed of by a consent decree rather than, as in the *American* and *TWA* cases, by settlement agreement approved by the district court under Rule 23 (e). In practical substance, the distinction between such a settlement and a consent decree may often be of little significance. But here the difference is material when the strict theory of subject matter jurisdiction is sought to be applied by the union. A consent decree is actually an exercise of the subject matter jurisdiction alleged in the complaint. In the *American* and *TWA* cases the settlement approval will result in dismissal of the complaint so that the allegations of jurisdiction will not be given effect.

3. The *McArthur* case illustrates the possible abuse of class action settlements by the dismissal of the class suit allegations and a consent decree between named parties without the hearing and approval order required by Rule 23(e) and to the prejudice of unnamed class members.

The possibility of such an abuse was the reason for the requirement of court approval in Rule 23(e). *Norman* v. *McKee*, 431 F. 2d 769, 774 (9th Cir. 1970), *cert. den.* 401 U.S. 912. Instead of directing a Rule 23(e) approval hearing as it had once indicated, the Fifth Circuit took the short cut of dismissing for admitted lack of subject matter jurisdiction. The policy favoring settlements was inapplicable because of the attempt by the consent decree to destroy the rights of unnamed class members.

CONCLUSION

Respondent TWA urges the denial of the certiorari petition.

Respectfully submitted,

JAMES A. VELDE,
One First National Plaza,
Chicago, Illinois 60603,
(312) 726-2452
Counsel of Record for Trans World Airlines, Inc.

Of Counsel:
LAURENCE A. CARTON,
GARDNER, CARTON & DOUGLAS,
One First National Plaza,
Chicago, Illinois 60603
(312) 726-2452

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No. 80-951

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Petitioners,

vs.

TRANS WORLD AIRLINES, INC.,

Respondent,

and

ANN B. ZIPES, PATRICIA A. SANTINI, AND PAMELA J. DAILING, INDIVIDUALLY AND ON BEHALF OF A CLASS,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ARAM A. HARTUNIAN
55 East Monroe Street
Chicago, Illinois 60603
(312) 372-6475

ARNOLD I. SHURE
10 South LaSalle Street
Chicago, Illinois 60606
(312) 346-4537

KEVIN M. FORDE
111 West Washington Street
Chicago, Illinois
(312) 726-5015

Counsel for Respondents Ann B. Zipes, Patricia A. Santini, Pamela J. Dailing and Sub-Classes A and B

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QUESTIONS PRESENTED

I. Whether the District Court had the power to effectuate a settlement which compromised a bona fide question of law regarding jurisdiction.

II. Whether the Court of Appeals' decision became final or operative during a stay of its mandate, where the stay was granted in order to facilitate settlement negotiations.

III. Whether an adequate basis existed for the District Court's approval of the settlement, independent of one of the settled cases, in light of the absence of any issue of jurisdiction in the other of the two settled cases.

IV. Whether a seniority remedy was barred solely because it affects seniority rights under a labor agreement.

V. Whether the District Court's order granting seniority to Title VII victims was an abuse of discretion where:

   A. There are 172 persons for whom seniority relief was ordered, compared with almost 7,000 incumbents;

   B. The seniority relief was not shown to have an adverse unusual impact upon the union members; and

   C. The union did not show that any facts or circumstances exist which are not generally found in Title VII cases.

VI. Whether the union's own inconsistent conduct, in first declaring that jurisdiction exists and then later asserting the opposite, estops the union from asserting a lack of jurisdiction.

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COUNTER-STATEMENT OF THE CASE

A. The Filing of the Suit by the Union; the 1972 Settlement

For many years prior to 1970, TWA and American Airlines fired any hostess who became pregnant or adopted a child. During 1970, the hostesses' union[1] (whose membership

[1] As used herein, the word "union" denotes the Petitioner (IFFA) and its predecessor unions which represented the same constituencies of airline hostesses.

no longer included the previously fired hostesses) was negotiating a new labor agreement. One of the issues being negotiated concerned the "no-mothers" policy. In August 1970, during these negotiations, the union filed this case on behalf of a class of all currently employed hostesses and all previously fired hostesses.[2] The union's complaint alleged that the policy violated the Civil Rights Act of 1964 ("the Act") and that the court had jurisdiction over all of the claims of both groups. Thereafter, the new labor agreement eliminated TWA's "no-mothers" policy for the future. The union then entered into a settlement with TWA which gave the previously fired hostesses the right to become reemployed as openings occurred, but without back pay or retroactive seniority. In March 1972, the District Court approved the settlement under Rule 23, F.R.C.P.

Several objecting class members appealed. The Seventh Circuit reversed. *Air Line Stew. & S. Ass'n, Local 550* v. *American Airlines,* 490 F. 2d 636 (7th Cir. 1973), *cert. denied,* 416 U.S. 993 (1974).[3] The cases were remanded with instructions to eject the union as the class representative, because of the conflict between the interests of the incumbent union members in retaining their seniority and the interests of the previously fired hostesses in regaining their seniority. The Seventh Circuit held that once the union members had attained their goal of rescinding the "no-mothers" policy:

> "... [the union members] had little further interest in the action, except for such interest as the junior among them would have adverse to the reinstatement of previously discharged stewardesses." 490 F. 2d at 638

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[2] A separate suit was concurrently filed against American Air Lines, which was consolidated with the *TWA* case.

[3] This was the second appeal in this case. The first appeal reviewed the denial of the EEOC's motion for leave to intervene to challenge the union's settlement.

The Seventh Circuit also chastised the union for failing to consult the other named plaintiffs about the proposed settlement (490 F. 2d at 638, 640) and for not even notifying the class members of their rights to opt-out (*Id.* at 642-643).

B. The Filing Of A Second Suit Against TWA By The Same Class

During the pendency of that appeal, the union entered into an agreement (without court approval) pursuant to which TWA reemployed only those class members who disassociated themselves from the pending case and the pending appeal. A timely EEOC charge was filed which alleged that this second agreement violated 42 U.S.C. § 2000e-3(a).[4] After the EEOC proceeding ran its course, in July 1974 the plaintiff class filed a new suit in the District Court, concerning which no dispute over jurisdiction has ever existed.[5] The cases were consolidated. Substantial discovery was completed but inasmuch as the relief overlapped the earlier case, the District Court permitted the second case to lay dormant, awaiting the outcome of the earlier case.

C. The District Court's Ruling On The Merits; TWA's Interlocutory Appeal

In April 1976, summary judgment was entered for the plaintiff class against TWA and American in the earlier cases. In 1976, the airlines for the first time raised the question of timely filing of EEOC charges, in a motion to exclude some of the class members from the case. In October 1976, the District Court rejected those motions. TWA and American took an interlocutory appeal from the two District Court orders under 28 U.S.C. § 1292(b).

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[4] 42 U.S.C. 2000e-3(a) makes it unlawful for an employer to discriminate against any employee because she has made a charge or participated in a proceeding or suit against the employer.

[5] This is the case to which the Petitioner refers when it states that "we need not mention the 'second suit' again". (Petn. 4, n.3)

While the appeal was pending, American settled with the class. American agreed to pay $2.7 million, reinstate the previously fired hostesses and leave the question of seniority to the District Court under § 706(g) of the Act (1970). The union intervened. Over the union's objections, and after an evidentiary hearing, the District Court granted retroactive seniority to the reemployed class members. The union appealed. In March 1978, the Seventh Circuit affirmed. *Air Line Stewards, Etc.* v. *American Airlines, Inc.*, 573 F. 2d 960 (7th Cir. 1978)[6] The union's petition for certiorari was denied. 439 U.S. 876 (1978).

In August 1978, the Seventh Circuit ruled on TWA's interlocutory appeal from the summary judgment and the class order. The summary judgment was affirmed on the Seventh Circuit's determination that the "no-mothers" policy violated the Act. *In re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F. 2d 1142 (7th Cir. 1978).[7] But the class order was reversed, in part, as to those previously fired hostesses who had not filed timely EEOC charges. 582 F. 2d at 1150-1151. The Seventh Circuit rejected the plaintiffs' arguments of waiver, estoppel and TWA's failure to plead its timeliness defense, on the ground that timely compliance with the EEOC filing requirement is jurisdictional. 582 F. 2d at 1151-1152. On account of ongoing settlement negotiations, at the request of the parties the mandate was stayed. The stay of the mandate has remained in effect continuously.

The plaintiff class petitioned this Court for certiorari to review the Seventh Circuit's ruling regarding jurisdiction. (Docket No. 78-1545). TWA cross-petitioned to review the determination of the merits. (Docket No. 78-1549).

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[6] This was the third appellate opinion in this case.

[7] This was the fourth appellate opinion in this case.

D. The Settlement With TWA

While the petitions for certiorari were pending, a settlement agreement was reached. The plaintiff class and TWA filed a joint motion to defer this Court's determination on whether to grant certiorari. By this Court's Order dated June 4, 1979, that motion was allowed so as to give the parties the time to finalize the settlement under Rule 23, F.R.C.P.

Along the lines of the settlement agreement in the *American* case, TWA agreed to pay a total of $3 million to the class ($1.5 million to each of the two subclasses),[8] reinstate those previously fired hostesses who desire reemployment, and leave the seniority question to the District Court under § 706(g).

The union was given notice of the seniority hearing, whereupon it intervened to resist the restoration of seniority. At the evidentiary hearing on the seniority question, it was established that there were 6,963 incumbent hostesses, as against only 172 members of Sub-class B who sought reemployment. The District Court approved the settlement and ordered the restoration of retroactive seniority for the reemployed class members. Under the District Court's order, reemployment is available only where a vacancy exists, so that no incumbent can be forced out of her job (or even be required to transfer to a different TWA base) in order to make room for a returning mother. Although it is possible that a previously furloughed incumbent may have to await recall until after a returning mother is rehired, that can happen to only the most junior incumbents, i.e., hostesses who had not even been hired as of the date of the settlement agreement. Regarding that hypothetical possibility, TWA's Vice-President testified:

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[8] Sub-class A is comprised of those (approximately 40) class members who filed timely EEOC charges. Sub-class B is comprised of the class members whose claims, just before the settlement, depended upon reversal of the Seventh Circuit's decision.

"... you are speculating about some girl that is going to high school in Kansas today, who may be hired two years from now."

The union appealed, which resulted in the Seventh Circuit's affirmance[9] from which the union now seeks certiorari.

[9] This decision marks the fifth appeal in this case.

SUMMARY OF ARGUMENT

Where the issue of jurisdiction poses a bona fide question of law, a District Court has the power to implement a settlement in which both sides compromise on that question. At any rate, this does not present an issue worthy of review by this Court. The Fifth Circuit did not address this issue and there is no conflict between the Circuits.

The settlement embraced *two* cases. In only one of those two cases was there an issue of timely filing as to some of the class members; and even in that case, the court had jurisdiction over *the case*. In the other case, there has never been an issue of jurisdiction.

Because the mandate of the Seventh Circuit was stayed, its opinion regarding jurisdiction did not prevent the District Court from effectuating the parties' compromise settlement.

As the union admitted, it never had standing to prevent TWA from compromising on the legal question of jurisdiction. The union's limited interest in the seniority question was fully and properly adjudicated.

The grant of seniority was clearly within the discretion of the District Court. The union failed to show any "unusual adverse impact". In fact, its effect upon the incumbents is *de minimus*.

The union's prior conduct in the case estops it from asserting a lack of jurisdiction.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I.

THE POWER OF A DISTRICT COURT TO APPROVE THE SETTLEMENT DOES NOT PRESENT AN ISSUE WORTHY OF REVIEW BY THIS COURT

A. The District Court Had the Power to Implement the Compromise Settlement

When the parties agreed to settle this case, the plaintiff class had prevailed on its substantive claims, and TWA had prevailed on its challenge to the scope of the class. However, neither victory had reached a final adjudication. With the filing of cross-petitions for writs of certiorari by both sides, the lawsuit was in a procedural posture which the Seventh Circuit aptly described as a "winner take all contest". (App. 8a)[10] Neither side desired to risk such a contest.[11] With leave of this Court, disposition of the petitions for certiorari was stayed, and the parties negotiated a settlement which has been approved by the District Court and the Court of Appeals.

The Seventh Circuit was plainly correct in enforcing the well-settled policy of encouraging settlements. (App. 6a) See also *Patterson* v. *Stovall*, 528 F. 2d 108, 114 (7th Cir. 1976); *Florida Trailer & Equipment Co.* v. *Deal*, 284 F. 2d 567, 571 (5th Cir. 1960). The Seventh Circuit aptly noted that:

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[10] Citations of "App. ____" refer to Petitioner's Appendix.

[11] As observed by the Seventh Circuit, the "jurisdictional" issue has not been addressed by this Court. (App. 7a) Contrary to the union's contention (Petn. 17-18), in *United Air Lines* v. *Evans*, 431 U.S. 553 (1977), this Court did not rule that failure of timely compliance with § 706(d) deprives a court of subject-matter jurisdiction. There, the plaintiff recognized that it was too late to complain of the earlier violation. 431 U.S. at 558. This Court simply held that perpetuation of the effects of the facially neutral seniority system did not comprise a new violation.

> "Where, as here, the jurisdictional question is not settled with finality, parties should not be forced to litigate the issue of jurisdiction if they can arrive at a settlement . . . ." (App. 9a)

As was held in *Aro Corp.* v. *Allied Witan Co.*, 531 F.2d 1368, 1371 (6th Cir. 1976):

> "Even in those instances in which the court's original jurisdiction may have been questionable, it has jurisdiction over settlement agreements, the execution of which renders the prior controversy academic."

The Seventh Circuit had reached the same conclusion in the third appeal in this case, in which the union challenged the settlement in the *American Airlines* case. *Airline Stewards, Etc.* v. *American Airlines, Inc.*, 573 F.2d 960, 963 (7th Cir. 1978), *cert. denied*, 439 U.S. 876 (1978). There is no reason why parties to a lawsuit may not negotiate a settlement when one of the issues is that of jurisdiction.

B. The Earlier Decision of the Court of Appeals did not Become Binding on the District Court

The mandate of the Seventh Circuit was stayed to allow a settlement of the controversy. Absent a mandate, the decision of the Seventh Circuit was neither final nor operative. Cf. *Bailey* v. *Henslee*, 309 F.2d 840, 844 (8th Cir. 1962); *Alphin* v. *Henson*, 552 F.2d 1033 (4th Cir. 1977). When the parties returned to the District Court to present their settlement for approval under Federal Rule 23(e), the District Court was free to act in accord with its prior decision, which had held that it had jurisdiction over all of the claims and that the airlines' defense of untimely EEOC filings was unavailing.

C. The Union Had a Limited Interest Which Was Fully Protected

As a third party with only a peripheral interest in the case, the union is obviously not an intended beneficiary of the time filing requirements of § 706(d). Where the employer gives up its right to a defense thereunder, the union has no right to intrude itself and insist that the employer's timeliness defense be litigated to the end. Accordingly, the union's interest must be limited to the extent of the *remedy* to be imposed. *Air Line Stewards, Etc.* v. *American Airlines,* 573 F.2d 960, 964; *EEOC* v. *American Tel. & Tel. Co.,* 556 F.2d 167, 173 (3rd Cir. 1977).[12]

Nor can the union bootstrap itself into a position of standing by asserting that "subject-matter jurisdiction" is absent. Even assuming that Congress intended the time-filing requirements of § 706(d) to be invulnerable to the equitable doctrines to which ordinary statutes of limitations are subject, it stretches that reading of Congress' intention too far to conclude that the failure to file EEOC charges on time deprives a federal court of "subject-matter jurisdiction". Section 706(f) is the only portion of the Act which addresses jurisdiction. It states:

> "Each United States district court . . . shall have jurisdiction of actions brought under this title."

It is manifestly unfair for the third-party union to insist that the settlement be ignored and that the bona fide question of law involved in the employer's personal defense be litigated to the bitter end. The union's only interest in the case—the question of seniority—was resolved by the Court at an adversary hearing.

The Seventh Circuit's decision upholding the power of the District Court to approve the settlement in this case provides no issue worthy of review in this Court.

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[12] In its initial objection to the awarding of seniority, the union acknowledged that it "has no standing to object and indeed does not object" to the other aspects of the settlement.

D. There Is no Conflict Between the Circuits on the Issue at Hand

The assertion of a conflict between the Seventh Circuit and the Fifth Circuit misapprehends *McArthur* v. *Southern Airways,* 569 F. 2d 276 (5th Cir. 1978), which was the second of two opinions in the same case.

In *McArthur,* the defendant recanted its earlier decision to settle and then moved to dismiss on the ground of plaintiffs' having failed to file timely EEOC charges. *McArthur* v. *Southern Airways,* 556 F. 2d 298, 300 (5th Cir. 1978). The motion was denied in the District Court. *Id.,* at 301. An appeal was taken regarding the adequacy of the settlement. Defendant cross-appealed on the point that its motion should have been allowed. *Id.,* 301 and 301 (n.6). Without considering that point, the Fifth Circuit reversed on the grounds presented by the plaintiff-objectors.

In a second opinion, the Fifth Circuit considered the defendant's argument for the first time and dismissed the case on the ground that the defendant's motions should have been granted. 569 F. 2d at 278. In this holding, the Fifth Circuit was in accord with the Seventh Circuit. But the Fifth Circuit did not rule on whether a District Court has jurisdiction over a settlement where the settling parties compromise on the issue of whether § 706(d) relates to subject-matter jurisdiction; *that* question was *not* before the Court in *McArthur.* There is no conflict between the Circuits on the narrow point involved here.

In addition, as the union concedes (Petn., 9, n. 11; 19, n. 15) the untimeliness argument only applies to *some* of the class members. Unlike *McArthur,* in this case there is no question that the court had jurisdiction over the *case.*

II.

THE AWARD OF RETROACTIVE SENIORITY DOES NOT IMPERMISSIBLY INFRINGE ON THE RIGHTS OF INCUMBENT UNION MEMBERS

A. There Has Been a Finding of a Violation

In some other case, an issue might arise over whether seniority relief is appropriate in the absence of a finding of a violation, i.e., where the violation is established only through a settlement.[13] But here the District Court's Order granting summary judgment expressly found that TWA had committed a violation (App. 41a), which was affirmed by the Seventh Circuit. (App. 48a)

B. A Court-Ordered Remedy Under § 706(g) Supersedes the Seniority Rights Existing Under a Labor Agreement

The District Court's Order granting retroactive seniority to reemployed class members does not tamper with the seniority system provided in the labor agreement. It merely credits returning employees with the time which they lost as a result of TWA's violation. That relief was completely consistent with this Court's holding that employee expectations arising from a seniority system must yield to relief under § 706(g). *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 779 (1976).

C. The District Court's Grant of Relief Under § 706(g) Was Clearly Within Its Discretion

Under the rule laid down by this Court in *Franks*, it was the union's burden in the District Court to demonstrate that seniority relief would have an "unusual adverse impact arising from facts and circumstances that would not be generally found

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[13] Acceptance of the union's argument would mean that there could never be a settlement of the liability aspects of a Title VII case.

in Title VII cases". 424 U.S. at 780 (n.41). The District Court conducted an evidentiary hearing on the seniority question, and found that the union failed to show any unusual adverse impact or any facts or circumstances not generally found in Title VII cases. (App. 9a-10a) The evidence showed that: (1) no class member's return to work would displace any incumbent, (2) only 172 members of Subclass B are eligible for reemployment, to be slotted into a seniority system which has a work force of 6,963 incumbents and (3) the miniscule amount of seniority which the incumbents will share with the class members came about in the first place only because of the unlawful deprivations which were suffered by these class members (and others who were fired but who will not return to work).[14]

III.

THE UNION'S OWN CONDUCT BARS IT FROM DENYING JURISDICTION.

When this case began, the union was on the plaintiffs' side. At that time, the union alleged that the District Court had jurisdiction over *all* of the claims, thus using the threat of recovery for the past victims in order to further its own negotiating goals. As soon as the union obtained rescission of the "no-mothers" policy in the future, it entered into the settlement agreement which abandoned the rights of the past victims (the non-union members). When the ejection of the union eventually led to a settlement which was of real value to the previously fired hostesses, the union did an about face and became the foe of the class. A class representative owes a fiduciary duty to the class members. *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 549 (1949). His use of the class suit to

[14] At the evidentiary hearing, the union's officer admitted that "any woman who will be junior to a returning class member will be . . . no worse off than if the returning class member had never been illegally fired in the first place".

enhance his own individual bargaining position is intolerable. *McArthur* v. *Southern Airways,* 556 F. 2d 298, 303 (5th Cir. 1977), vacated on other grounds, 569 F. 2d 276 (1978).

In reversing the District Court's approval of the 1972 sellout settlement, the Seventh Circuit appropriately chastised the union for, among other things, failing to consult the named plaintiffs about the proposed settlement and acting in a position of a clear conflict of interests. *Air Line Stew. & S. Ass'n, Local 550* v. *American Airlines, Inc.,* 490 F. 2d 636, 638, 640 (7th Cir. 1973), *cert. denied sub nom Air Line Stewards & Stewardesses Ass'n, Local 550* v. *Zipes,* 416 U.S. 993 (1974). As part of its shabby performance, the union did not even notify the class members of their Rule 23(c)(2) opt-out rights. 490 F. 2d at 642-643.

Although the Seventh Circuit did not find it necessary to address this argument, ample authority exists to estop the union from taking this position. See, e.g., *Alger* v. *Hayes,* 452 F.2d 841 (8th Cir. 1972); *In Re Double D Dredging Co.,* 467 F. 2d 468 (5th Cir. 1972); *Smith* v. *Montgomery Ward & Co.,* 388 F.2d 291 (6th Cir. 1968), *cert. denied,* 393 U.S. 871 (1968); *Di Frischia* v. *New York Central R.R.,* 279 F.2d 141 (3rd Cir. 1960); *Scarano* v. *Central R. Co. of New Jersey,* 203 F.2d 510, 512-513 (3rd Cir. 1953); Stephens, *Federal Jurisdiction by Estoppel,* 68 Dickinson L. Rev. 39 (1963).

Because of its attempts to play "fast and loose" with the courts, see *DiFrischia, supra,* the union should be estopped from asserting a lack of jurisdiction or otherwise challenging the settlement.

CONCLUSION

The District Court had the power to recognize and effectuate the compromise regarding the legal question of jurisdiction, particularly inasmuch as the Seventh Circuit's mandate had been stayed. In any event, the settlement agreement rests on the ample jurisdictional foundation of one of the two settled cases (and at least part of the other settled case).

The grant of seniority was not an abuse of the District Court's discretion. The union is estopped from asserting the absence of jurisdiction. There is neither a conflict between the circuits nor an issue of sufficient importance to justify review in this Court.

The writ should not be granted.

Respectfully submitted,

ARAM A. HARTUNIAN
55 East Monroe Street
Chicago, Illinois 60603
(312) 372-6475

ARNOLD I. SHURE
10 South LaSalle Street
Chicago, Illinois 60606
(312) 346-4537

KEVIN M. FORDE
111 West Washington Street
Chicago, Illinois
(312) 726-5015

Counsel for Respondents Ann B. Zipes, Patricia A. Santini, Pamela J. Dailing and Sub-Classes A and B

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No. 80-951

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Petitioner,

v.

TRANS WORLD AIRLINES, INC.,
Respondent,

and

ANNE B. ZIPES, PATRICIA A. SANTINI, and PAMELA J. DAILING, individually and on behalf of a class,
Respondents.

PETITIONER'S REPLY TO BRIEFS IN OPPOSITION

WILLIAM A. JOLLEY
STEVEN A. FEHR
SCOTT A. RAISHER
1300 Traders Bank Building
1125 Grand Avenue
Kansas City, Missouri 64106
Tel: 816-474-1240

Counsel for Petitioner

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY TO COUNTER-STATEMENT OF THE CASE

Some of the statements made by Plaintiffs in their "Counter-Statement of the Case" are incomplete and misleading.[1] Accordingly, we find it necessary to make the following clarifications.

1. Plaintiffs make constant references to "the union." (Plaintiffs' Brief, p. 1, n. 1). Petitioner IFFA did not

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[1] References to the individual Respondents' Brief in Opposition will be made (Plaintiffs' Brief, p. —). References to Respondent TWA's Brief in Opposition will be made "TWA's Brief, p. —."

come into existence until April 1, 1977. Prior to that date, another union represented TWA's flight attendants.

2. Plaintiffs also leave the impression that this Union represents the flight attendants at American Airlines. IFFA has never represented American's flight attendants.

3. Plaintiffs also imply that the *American Airlines* case is this case (Plaintiffs' Brief, p. 4, n. 6). It is not. The two cases are similar, and for periods of time were consolidated for certain purposes, and some joint orders issued. But they are two separate cases with significant differences. For example, in *American* an EEOC charge was filed as early as 1967, whereas here no charge was filed until 1970. *See, ALSSA* v. *American Airlines*, 573 F.2d 960, 962, n. 2 (7th Cir. 1978).

4. Plaintiffs' statement that there are only 172 plaintiffs to be absorbed into a work force of 6,963 is wrong (Plaintiffs' Brief, p. 5). At the time the district court approved the settlement it was estimated that 205 class members would be returning to the work force with full retroactive competitive seniority.[2] Since that time other former flight attendants have surfaced claiming class membership and desiring to return to work. In addition, there are at least 78 class members who have already returned to the work force who stand to gain significant amounts of seniority pursuant to this settlement. Thus, if the settlement is implemented current flight attendants will be lowered as much as 300 rungs on the seniority ladder. Further, the size of the actual work force, which was slightly in excess of 6,000 at the time of the settlement has shrunk to approximately 5,600 due to current economic conditions.[3]

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[2] This figure included an estimated 33 Sub-Class A members.

[3] The 6,963 flight attendants Plaintiffs refer to include many people not in the work force: flight attendants on leave, furlough, supervisor status, etc.

5. More serious is Plaintiffs' inaccurate statement that no incumbent flight attendant can be "forced out of her job" or required to transfer pursuant to this settlement; and that the only flight attendants on furlough who will be forced to "await recall" due to the settlement are those not hired as of the date of the settlement agreement (Plaintiffs' Brief, p. 5). While it is true that under the settlement class members will not be re-employed until a vacancy exists, they receive preference for such vacancies over flight attendants on furlough; and there are currently more than 400 flight attendants on furlough who were employed *before* the settlement agreement. Many of these flight attendants have been on furlough since October of 1979; and they will lose their employment permanently if not recalled within three years from date of furlough (App. 63a-64a).[4] Moreover, once the Plaintiffs return, those flight attendants lowered on the seniority ladder will be placed much closer to the serious threat of furlough.

Similarly, Plaintiffs' theory that no flight attendants will be forced to transfer because of the settlement assumes that TWA's headcount only increases, which it obviously does not. For example, if a domicile presently staffed by 300 flight attendants is increased to 310, and ten class members fill these positions, any subsequent reduction in force below 310 will displace incumbent flight attendants (because of Plaintiffs' seniority). These flight attendants will be forced to transfer to another domicile (if they have enough seniority) or be furloughed.

THE "SECOND SUIT" THEORY

Plaintiffs contend that the otherwise fatal jurisdictional defects in the basic 1970 lawsuit are cured by the filing of a "second suit" in 1974. The second suit attacks

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[4] This refers to the Appendix to our Petition.

the aborted settlement of the first action on the theory that the settlement agreement constituted retaliatory conduct prohibited by Title VII because it failed to include retroactive seniority between dates of termination of and reinstatement to employment.

This unusual theory has never been mentioned by the district court, the Seventh Circuit, or by TWA. Plaintiffs mention it only in their Summary of Argument (Plaintiffs' Brief, p. 7) and in their Conclusion (Plaintiffs' Brief, p. 15). It is not found in the body of Plaintiffs' argument. Indeed, this argument is so strange that we hesitate to dignify it with a response. Nonetheless, out of an abundance of caution, we will briefly reply.

First, Plaintiffs' assertion that "no dispute over jurisdiction has ever existed" in the second suit (Plaintiffs' Brief, p. 3) is, at the very least, misleading. *Neither defendant has even filed an Answer.* Both defendants have filed motions to dismiss which are still pending. TWA has certainly never conceded jurisdiction. In addition to the open question of jurisdiction, numerous other questions abound as to the viability of the second suit. For example, at the time of the first settlement, TWA and Plaintiffs were not in an employer-employee relationship and thus it is difficult to comprehend what could be the basis for any Title VII charge. See, 42 U.S.C. § 2000e-3(a).

Second, even if Plaintiffs could prevail on the second suit, there is no reason to believe that this would enable them to obtain retroactive competitive seniority. As this Court stated in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975), the scope of relief under Title VII is intended to make victims whole by restoring them to a position where they would have been were it not for the unlawful discrimination. This standard would foreclose employment-related relief in the second suit. If the first settlement had never been attempted Plaintiffs would remain merely former employees with time-barred claims.

Third, the second suit was filed long before the Seventh Circuit's decision in *Consolidated*. Nonetheless, the Seventh Circuit determined that the claims of 92% of the class were jurisdictionally barred, tacitly yet clearly rejecting the second suit bootstrap argument.[5] Plaintiffs' Petition for *Certiorari* (No. 78-1545), arguing the existence of jurisdiction, makes no mention of the second suit. Clearly, if the second suit could somehow provide jurisdiction for this settlement, it could also provide jurisdiction for the merits.

Finally, the second suit cannot serve as a basis for a grant of seniority because a necessary party is missing. The old union is a defendant in the second suit, yet neither the old union nor the new union are parties to a settlement which overrides the contractual rights of IFFA and its members. Without the consent of the Union, or a finding that Title VII has been violated, the court cannot grant seniority. The arguments advanced in our Petition (pp. 18-26) apply here with even more force.

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[5] Previous counsel for Plaintiffs testified that a major reason for entering into the first settlement was the likelihood that the Title VII time limits would preclude most Plaintiffs from obtaining relief. He was correct. The Seventh Circuit subsequently held 92% of the claims barred because of time-filing defects. Not only did Plaintiffs fail to gain interim seniority under the *Consolidated* opinion; they also were denied the reinstatement with seniority to date of termination which the first settlement offered. Clearly, for 92% of the class, the first settlement was far superior to anything obtained through subsequent litigation. (It was also superior to the second settlement, since Plaintiffs remained out of work an additional eight years merely to obtain $3,750 minus costs and attorneys fees). Incredibly, the current class representatives still accuse the prior class representatives of negotiating a "sellout settlement" (Plaintiffs' Brief, p. 14); while ironically arguing that the first settlement provides the jurisdiction to obtain through a second settlement what Plaintiffs could not obtain through litigation.

REPLY TO RESPONDENTS' ARGUMENTS CONCERNING JURISDICTION

1. Respondents cite only one case to support the holding that a settlement may provide jurisdiction where it is otherwise lacking: *Aro Corp.* v. *Allied Witan Company*, 531 F.2d 1368 (6th Cir. 1976) (Plaintiffs' Brief, p. 9). *Aro* dealt with a motion for relief from judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure; the court's jurisdiction of the case which spawned the settlement was never in question. Moreover, the language Plaintiffs quote from *Aro* is followed by a single citation to *Meetings & Expositions, Inc.* v. *Tandy Corp.*, 490 F.2d 714 (2nd Cir. 1974). *Tandy Corp.* involved the waiver of *personal jurisdiction* pursuant to a settlement, not subject matter jurisdiction.

2. Plaintiffs' "estoppel" argument (Plaintiffs' Brief, pp. 13-14) is unsound and unsupported by the facts. It is curious, however, that Plaintiffs raised precisely the same argument against TWA in their Petition for *Certiorari*.[6] Thus, Plaintiffs have argued that the same issue on one hand provides a strong reason for granting their petition, but on the other provides reasons for denying *certiorari* here. The inconsistency is obvious; as is the inconsistency in Plaintiffs' position that the only issues in this case worthy of review by this Court are the ones Plaintiffs choose to present.

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[6] See the Petition for *Certiorari* in Case No. 78-1545, p. 9.

REPLY TO RESPONDENTS' ARGUMENTS CONCERNING THE RIGHTS OF UNIONS AND INCUMBENT EMPLOYEES PURSUANT TO TITLE VII SETTLEMENTS

In our Petition (pp. 18-26) we demonstrated that this case presents an important issue regarding the rights of unions and incumbent employees in Title VII settlements to which they are not parties; and that conflict exists among the circuits on this issue (pp. 22-25). The Briefs in Opposition are silent on this split of authority. Plaintiffs, however, try to dodge the issue by alleging (Plaintiffs' Brief, p. 12) that the district court has made a "finding" which is sufficient to support a class-wide grant of seniority. That "finding", of course, was reversed as to 92% of the class by the Seventh Circuit *Consolidated* opinion. It is ludicrous to contend that the rights of the Union and the incumbent employees are governed by a "finding" which has been reversed. Rather, the law is that the remedy of competitive seniority is not available until "after a violation has been proved." *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 559 (1977). A violation has not been "proved" when plaintiffs enter into a settlement after losing at the Court of Appeals. The reason a violation could not be "proved" in *Evans* was that plaintiffs there could not meet the time limits. The same is true here.

Plaintiffs also contend that "Acceptance of the Union's argument would mean that there could never be a settlement of the liability aspects of a Title VII case" (Plaintiffs' Brief, p. 12, n. 13). Nonsense. It would mean only that where liability has not been proved and the Union is not a party to the settlement, the company and the plaintiffs could not agree to grant the plaintiffs competitive seniority.

CONCLUSION

Respondents have urged that the writ be denied so that the settlement will not be frustrated. But settlements which abrogate the legitimate seniority rights of incumbent employees on behalf of individuals who have failed to prove a violation of Title VII should be frustrated. The writ should be granted.

Respectfully submitted,

WILLIAM A. JOLLEY
STEVEN A. FEHR
SCOTT A. RAISHER
1300 Traders Bank Building
1125 Grand Avenue
Kansas City, Missouri 64106
Tel: 816-474-1240

Counsel for Petitioner

Office-Supreme Court, U.S.
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No. 80-951 [Consolidated with No. 78-1545]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Petitioner,

v.

TRANS WORLD AIRLINES, INC.,
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and

ANNE B. ZIPES, PATRICIA A. SANTINI, and PAMELA J. DAILING, individually and as class representatives,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR PETITIONER IN NO. 80-951

WILLIAM A. JOLLEY
Counsel of Record

STEVEN A. FEHR
SCOTT A. RAISHER
1125 Grand Avenue
Kansas City, Missouri 64106
(816) 474-1240
Attorneys for Petitioner

Of Counsel
GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

1. In an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* by former employees solely against an employer, may a court, pursuant to a settlement of that action, over the objection of the union representing incumbent employees, and absent a finding that such former employees are entitled to relief as discriminatees under Title VII:

a) order that the provisions of the settlement supersede the collective bargaining agreement between the employer and the union by granting full retroactive seniority to those former employees?

b) grant full retroactive competitive seniority to those former employees despite the absence of a determination, such as in *Franks v. Bowman Transportation Company, Inc.*, 424 U.S. 747 (1976), that they are entitled to such relief under §§ 706(g) of that Act?

2. Where a court of appeals has determined that the district court has no subject matter jurisdiction over certain claims under Title VII does the district court nonetheless have jurisdiction:

a) to approve a settlement of those same jurisdictionally-defective claims;

b) order that plaintiffs (former employees) be awarded retroactive competitive seniority;

c) order that the provisions of the settlement supersede the collective bargaining agreement between the employer and the union representing the incumbent employees;

all of the above actions being taken over the objection of the collective bargaining representative (union) of such employees?

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and

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONER IN NO. 80-951 [1]

OPINIONS BELOW

The opinion of the Court of Appeals in No. 80-951 is reported at 630 F. 2d 1164. It is reproduced at pp. 1a to 10a of the Petition for Writ of Certiorari in that case (hereafter referred to as "IFFA Pet."). The three relevant orders of the district court have not been published

[1] The joint appendix of the parties in these consolidated cases (Nos. 78-1545 and 80-951) has been printed in two volumes, which will be referred to respectively as J.A. Vol. I, p. —— and J.A. Vol. II, p. ——. Vol. II consists of matters occurring after the August 1978 decision of the Seventh Circuit (*Consolidated*), which is described at p. 15, *infra*. As will appear, IFFA first became a participant in these proceedings as a result of developments in this litigation subsequent to that Seventh Circuit decision. See p. 11, *infra*.

but appear in IFFA Pet. at pp. 13a-19a. The consolidated case, No. 78-1545, seeks review of an earlier opinion by the Court of Appeals in this case which has been reported as *In re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F.2d 1142 (7th Cir. 1978), and this opinion appears in IFFA Pet. at pp. 40a-58a. Two other opinions have issued from the Court of Appeals during the history of this litigation, and they appear at 490 F.2d 636 and 455 F.2d 101. Previous opinions of the district court have been unofficially reported at 9 FEP 101; 12 FEP 1461; and 17 FEP 1512.

JURISDICTION

The judgment of the Court of Appeals in No. 80-951, was entered on June 13, 1980. A timely petition for rehearing was filed on June 25, 1980. The petition for certiorari was filed on December 12, 1980, and certiorari was granted on March 9, 1981.[2] The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES, CONSTITUTIONAL PROVISIONS, AND RULES INVOLVED

Case No. 80-951 involves Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, particularly § 703(h), 42 U.S.C. § 2000e-2(h); § 706(d), 42 U.S.C. § 2000e-5(d) (1964); and § 706(g), 42 U.S.C. § 2000e-5(g) and the Railway Labor Act as amended, 45 U.S.C. § 151-88, particularly § 2, Seventh, 45 U.S.C. § 152, Seventh. It also involves Article III and the Due Process Clause of the Fifth Amendment to the Constitution of the United States, and Rules 23(e) and 82 of the Federal Rules of Civil Procedure. The pertinent text of these provisions appears in Appendix A to this Brief, pp. 1a-2a, *infra*.

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[2] An order limiting the grant in No. 80-951 to the first two questions presented and otherwise dismissing the writ as improvidently granted was entered on May 1, 1981 (J.A. Vol. II, pp. 212-213).

STATEMENT OF THE CASE

Introduction

Independent Federation of Flight Attendants (hereafter "IFFA"), the petitioner in No. 80-951, is the statutory bargaining representative under the Railway Labor Act of the flight attendants of respondent Trans World Airlines, Inc. (hereafter "TWA"). The judgment under review in No. 80-951 is an order of the District Court, affirmed by the Court of Appeals, which approves a "settlement agreement" entered into between TWA and the other respondents who, individually and as class representatives, brought suit against TWA under Title VII of the Civil Rights Act of 1964. These individuals and their class will sometimes be referred to herein as "Plaintiffs"; TWA will sometimes be referred to as "Defendant". The litigation between the Plaintiffs and the Defendant will be described in Part 2 of this Statement; it suffices for present purposes to note that the Court of Appeals for the Seventh Circuit decided the suit in favor of some members of the Plaintiffs' asserted class but adversely to approximately 92% of them. See *In re Consolidated Pre-Trial Proceedings In The Airline Cases*, IFFA Pet. 40a-58, reported at 582 F. 2d 1142 (1978), and referred to hereafter as "*Consolidated*". Separate petitions for certiorari were filed to review that judgment: No. 78-1545 (petition of Plaintiffs Zipes, *et al.*) and No. 78-1549 (petition of TWA).

1. *The Settlement Agreement Between Plaintiffs And TWA And Its Impact On IFFA And The Incumbent Flight Attendants.*

After filing the above-described petitions for certiorari Plaintiffs and TWA moved to defer their consideration in order that they might negotiate a settlement of their litigation. This Court granted that request on June 4, 1979. The class representatives and TWA subsequently did reach a settlement agreement. (IFFA Pet. at 23a) which we now describe.

The Agreement divides the Plaintiffs into two "subclasses": Sub-Class A, consisting of those individuals whose claims are valid according to the *Consolidated* opinion; and Sub-Class B, consisting exclusively of those individuals whose claims were determined to be jurisdictionally defective. (IFFA Pet. at 24a). In the settlement agreement TWA denies liability (IFFA Pet. at 25a), but agrees to pay the sum of three million dollars to the Plaintiff class; half to be divided among the members of Sub-Class B. (IFFA Pet. at 26a). The Notice to Class Members accompanying the settlement agreement estimates that there are 30 women in Sub-Class A and 400 in Sub-Class B (this estimate proved to be low because additional putative class members came forward later). The Notice also states that Plaintiffs' counsel would seek as much as $1,250,000 in attorney fees (plus costs). Half of the legal fees and costs are to be assessed to each Sub-Class. (J.A. Vol. II, p. 9).[3]

The settlement agreement further provides that TWA will offer re-employment to all class members who are "ready, willing and qualified" (IFFA Pet. 26a). Each re-employed class member is to receive full company and union seniority (IFFA Pet. 27a, 29a). Such seniority can be more accurately characterized in two categories: "benefit" seniority and "competitive status" seniority. See p. 19-20, *infra*, quoting *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 766. The provisions relating to benefit seniority have not been challenged by IFFA—nor have TWA's monetary obligations—and are not at issue. Under the TWA-IFFA agreement that benefit seniority is of considerable value to the Plaintiffs: For example, under Article 3 of the Agreement monthly rates of pay increase substantially in each category of employment for every six or twelve months of service,

[3] The agreement expressly provides that TWA will have no monetary or other obligation to any member of the class or representative or attorney thereof unless expressly provided in the agreement (J.A. Vol. II, p. 27a).

as the case may be. See TWA-IFFA Agreement (October 11, 1978, pp. 6-16). So too under Article 21, retirement benefits depend on the length of company service (*id.* pp. 200-207).

The provisions of the settlement agreement which *are* at issue between IFFA and the other parties to No. 80-951 are those which deal with the competitive status seniority of the Plaintiffs who are to be re-employed under the agreement, and which directly and adversely affect incumbent flight attendants. On this subject the settlement agreement originally stated:

> TWA agrees with the class that the class members who will be re-employed shall be restored to full occupational (union) seniority and credit for length of service to the same extent as is provided in Section V.A above. *However, in the event of the timely objection of any interested person, it is agreed that the amount of seniority and credit for length of service for the compensation period will be determined by the Court in its discretion, pursuant to the provisions of Section 706(g), and all other applicable provisions of law, without contest or objection by TWA.* The Court's award of seniority and credit for length of service will be added to each class member's seniority and credit for length of service to which she was entitled at the time her employment was terminated. [IFFA Pet. at 29a-30a, emphasis added.]

After the court hearing on the approval of the settlement, an "amendment" was introduced altering this section to read:

> It is agreed that the total amount of seniority and credit for length of service (both accrued and retroactive) for the compensation period *will be determined by the Court in its discretion, pursuant to the provisions of Section 706(g), and all other applicable provisions of law, without contest or objection by TWA.* [IFFA Pet. at 20a, emphasis added].

The record shows that competitive status seniority governs a broad range of employment conditions, including, but by no means limited to, the opportunity to retain, and be recalled to employment. The provisions of the collective bargaining agreement which depend upon the competitive status seniority are summarized in an exhibit at J.A. Vol. II, pp. 102-103 and are reproduced in part, *id.* at 90-101. They are discussed at length in the testimony of Victoria Frankovich, J.A. Vol. II, pp. 35-57.[4]

Among the benefits, protections and options dependent solely upon competitive seniority—and diminished by the grant of competitive seniority to Plaintiffs—are:

a) furlough (layoff) and recall (CBA Art. 10(B), J.A. Vol. II, pp. 92, 12(B), *id.* pp. 93-96, 12(F), *id.*, p. 97; Frankovich testimony, *id.*, pp. 38-39);

b) displacement (bumping) to avoid furlough (CBA Art. 12(B), J.A. Vol. II, pp. 93-96; Frankovich testimony, *id.*, pp. 40-42);

c) rest days and times, work days and times, overtime hours and earnings, and number of nights away from home (all determined by bidding for monthly schedules) (CBA Art. 18-A(D)(5), J.A. Vol. II, p. 100, and 18-B(D)(5); Frankovich testimony, *id.*, pp. 46-51);

d) transfer to different domiciles and work classifications (including promotions), (CBA Art. 13(A), J.A. Vol. II, p. 98, and LETTER NO. II, *id.*, p. 101; Frankovich testimony, *id.*, pp. 43-44).

e) vacation bidding (CBA Art. 9(C), J.A. Vol. II, pp. 90-91; Frankovich testimony, *id.*, p. 38).

TWA's flight attendants work out of domiciles or base stations located in New York, Boston, Chicago, St. Louis, Kansas City, San Francisco and Los Angeles. (Ex. 6,

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[4] Evidence on this subject came into the record at the October 3 hearing on the validity of the settlement agreement. All exhibits referred to herein were introduced by IFFA. Ex. 16, J.A. Vol. II, pp. 102-103, is a complete list of competitive seniority benefits.

J.A. Vol. II, p. 87). They are assigned to either international or domestic operations. On international operations the work classifications, in ascending pay order, are international cabin attendant, international purser, and international service manager; on domestic, the classifications are domestic cabin attendant and domestic service manager (CBA Art. 3).

The average seniority of incumbent flight attendants, as of the time of the settlement between TWA and Plaintiffs, was just over nine years (Crombie depo., J.A. Vol. II, p. 173), while the seniority of the returning Plaintiffs will range from nine to thirty years. (Ex. 8, J.A. Vol. II, p. 88). Of the 7,030 incumbent flight attendants, 4,447 have been hired since the beginning of 1970 (Ex. 9, J.A. Vol. II, p. 89), and each one will be lowered in the seniority roster by the total number of returning Plaintiffs.[5]

These factors, coupled with TWA's extraordinary economic situation and reduction in work force due to recession and fuel prices (Crombie depo., J.A. Vol. II, pp. 149-152), greatly increase the adverse impact on incumbents from the grant of seniority. Among the more serious consequences are:

1) *Effect on Current Furloughees.* Effective October 30, 1979, 164 flight attendants were furloughed (Ex. 27, J.A. Vol. II, p. 191); in June, 1980, an additional 141 flight attendants were furloughed. None have been recalled. The excess work force is, in reality, much larger than the 305 furloughs by virtue of a contractual provision requiring the offering of leaves of absence in order to reduce the number of furloughs (CBA Art. 12(B), J.A. Vol. II, p. 93). The number of flight attendants on

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[5] An additional number of incumbents will be lowered on the seniority roster, not by the total number of returning Plaintiffs, but only by the number of Plaintiffs with greater seniority. (Ex. 8, and Ex. 9, J.A. Vol. II, pp. 88, 89).

such leaves of absence was 950 in January of 1980 and 721 as of January, 1981.[6]

TWA's Vice President, David Crombie, speculated in September of 1979 that flight attendants furloughed in the then near future would be recalled within one year and that new hires would also be added to the payroll (Crombie depo., J.A. Vol. II, p. 158). The Seventh Circuit relied upon this speculation. (IFFA Pet. at 10a). In fact, in the two years since the settlement agreement was reached, more than 300 flight attendants have been involuntarily furloughed, none have been recalled, and obviously no new flight attendants have been hired.

When Plaintiffs are prepared to return to the work force, on any vacancies which arise, the present furloughees will pit their seniority for such vacancies against that of the class members. (Crombie depo., J.A. Vol. II, pp. 159-160). Plaintiffs will win and the furloughees will lose, since the grant of seniority gives all Plaintiffs far more seniority than the furloughees. (Ex. 9, J.A. Vol. II, p. 89). If furloughees are not recalled within three years (October, 1982 and June, 1983, respectively) they will lose their recall rights and be permanently removed from the seniority list (CBA Art. 12(F), J.A. Vol. II, p. 97).

2) *Effect of Future Furloughs: Displacement and Loss of Pay.* Once Plaintiffs have been absorbed into the work force there may, of course, be future furloughs. In this event, flight attendants who would otherwise be protected will be furloughed due to Plaintiffs' seniority. Other flight attendants junior to Plaintiffs, though not furloughed, will be displaced from higher-paid to lower-paid classifications, from domicile to domicile, and from inter-

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[6] Obviously, only some of these facts were known by the District Court in November of 1979. However, the proceedings in the District Court involved an attempt to determine future impact of the seniority grant to Plaintiffs, an exercise which, by definition, is conjectural. The actual events occurring subsequent to the District Court proceedings, referred to herein, are a more accurate measure of such impact.

national to domestic operations (CBA Art. 12(B), J.A. Vol. II, pp. 93-96). Reduction in classification can reduce earnings by thousands of dollars per year. Yearly income reduction from displacement to domestic operations would range from $1,610 to $4,939 (Ex. 17, J.A. Vol. II, p. 104). The effects of displacement to another domicile, apart from income reduction due to change in classification or operation, are severe: a flight attendant may continue to live in the former domicile and commute to the new domicile, or may relocate. Both commuting expenses and moving expenses are borne by the flight attendant (Oct. 3 Stipulation, J.A. Vol. II, p. 85; Crombie depo., depo., p. 66, J.A. Vol. II, p. 180).[7]

3) *Loss of Monthly Bidding Opportunities.* Flight attendants bid, on a monthly basis, for "run selections," i.e., a monthly schedule of trips. These run selections are awarded on the basis of seniority. (CBA Art. 18-A(D)(5) and 18-B(D)(5), J.A. Vol. II, pp. 99-100). The run selections determine the days of the week a flight attendant works, the days off, times of work, destination of trips, and monthly pay including overtime (CBA Art. 18-A(D)(2) and 18-B(D)(2), J.A. Vol. II, pp. 46-52). These run selections determine whether a flight attendant completes the monthly work requirement in as few as eight work days, or as many as twenty-one work days (J.A. Vol. II, pp. 49-50); whether a flight attendant gets paid only base pay for sixty-five hours or up to thirty-five additional hours, at overtime rates, ranging from $17.41 per hour for a new domestic cabin attendant to $37.03 for

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[7] A flight attendant displaced to another domicile may, because of low seniority, be unable to commute to and from work. If, by virtue of seniority, the flight attendant were on reserve at the new domicile, he/she would have to be available for duty within two hours of call to work. (J.A. Vol. II, pp. 53-54). For such a flight attendant, relocation, together with attendant separation from spouse, family, etc., would be the only alternative. (Ex. 20(b), J.A. Vol. II, pp. 107-108; Ex. 20(e), J.A. Vol. II, pp. 112-113; Ex. 20(i), J.A. Vol. II, pp. 124-125; or Ex. 20(a), J.A. Vol. II, pp. 128-129; and Ex. 20(s), J.A. Vol. II, pp. 130-131).

a six-year international service manager (CBA Art. 3(B); J.A. Vol. II, p. 51); and whether the flight attendant can schedule "turnaround trips" (trips with no overnight layovers, something very desirable to mothers with young children). (Crombie depo., J.A. Vol. II, pp. 163-164; Ex. 20(h), J.A. Vol. II, p. 116; Ex. 20(l), J.A. Vol. II, p. 122).

All incumbent flight attendants with seniority less than that of returning Plaintiffs will have a reduced ability to hold run selections they presently enjoy and will be set back in their wait for and expectation of desirable runs in the future.

4) *Downgrade From Schedule Holder to Reserve.* Flight attendants with insufficient seniority to successfully bid for a monthly run selection are placed on reserve. Unlike schedule holders, reserves do not know their work schedules in advance; they may be called upon to work with no notice, up to two hours' notice, or at most one day's notice. (J.A. Vol. II, pp. 52-54.)

Under the settlement all Plaintiffs would have sufficient seniority to be schedule holders (Crombie depo., J.A. Vol. II, p. 164). The grant of seniority to Plaintiffs will cause line holders in all domiciles to revert to reserve status.[8] Similarly those flight attendants who have put in their time as reserves, working toward accumulation of enough seniority to hold a schedule, will have their wait prolonged.[9] (Crombie depo., J.A. Vol. II, pp. 164-166).

5) *Transfer to Different Domiciles.* As indicated from the wide variances in seniority at the various domiciles

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[8] For examples of effects of a downgrade to reserve status, see Ex. 20(a), J.A. Vol. II, pp. 105-106; Ex. 20(c), J.A. Vol. II, pp. 109-110.

[9] The wait for schedule-holder status can be lengthy. In Los Angeles, international flight attendants with 1967 seniority are still on reserve. Los Angeles domestic reserves with seniority dating to 1972 are also still waiting for schedule-holder status. (Exs. 10 and 11).

(Exs. 10 and 11), some domiciles are more popular or desirable than others. Transfers between domiciles are based on seniority. CBA Art. 13(A); J.A. Vol. II, pp. 43-44). Plaintiffs desiring transfers will have preference over those with less seniority, thereby prolonging the incumbents' wait for access to the domicile of their choice.

As shown, the provisions of the settlement agreement between Plaintiffs and TWA regarding competitive seniority are directly contrary to the current TWA-IFFA collective bargaining agreement. (See also IFFA, Pet. at 62a-63a). It also purports to override past, present and future agreements between that employer and the statutory representative of its flight attendant employees (*Id.* at 36a).

2. ***The Proceedings on the Validity of the Settlement Agreement and the Judgments Under Review in No. 80-951.***

Upon learning of the new settlement agreement and the likelihood that the settlement, if approved, would cause the return of hundreds of women to the bargaining unit with great amounts of retroactive competitive seniority, IFFA intervened and objected to any grant of retroactive competitive seniority to the class members.

At the hearing on the approval of the settlement held on July 31, 1979, and in subsequent briefs, IFFA argued, *inter alia*, that (1) the District Court had no subject matter jurisdiction to approve the settlement and grant retroactive competitive seniority since the Seventh Circuit had already determined that there was no subject matter jurisdiction over the claims of the members of Sub-Class B; (2) the settlement agreement could not override the collective bargaining agreement between IFFA and TWA; and (3) the court could not grant retroactive seniority to all Plaintiffs pursuant to this settlement.

The District Court overruled the jurisdictional challenge in an order issued on September 14, 1979. (IFFA

Pet. at 13a). Judge Roszkowski reasoned that the Seventh Circuit's finding of a lack of subject matter jurisdiction was not final and therefore not binding. The court declined to address the other objections raised by the Union and set a hearing for October 3, 1979, regarding the impact a grant of seniority would have upon the incumbent flight attendants.

On November 8, 1979, the District Court signed two orders which had been drafted by counsel for the parties to the settlement. One order approved the settlement agreement and stated that the court would retain jurisdiction to determine seniority, adjudicate disputes, and enforce the settlement (IFFA Pet. at 16a). The other order awarded full retroactive competitive seniority to all Plaintiffs (IFFA Pet. at 18a). This order stated that the grant of seniority would not have an "unusual adverse impact" upon currently employed flight attendants.

IFFA appealed and the Seventh Circuit affirmed in an opinion issued on June 13, 1980 (IFFA Pet. at 1a). The Seventh Circuit held that despite its previous (and unchanged) ruling regarding the lack of subject matter jurisdiction, the District Court nonetheless had jurisdiction to approve a class action settlement and to grant seniority pursuant to that settlement, despite the objections of IFFA and the incumbent employees. The court reasoned (1) that the principles favoring settlement required this result; (2) that parties should not be "forced to litigate" a contested issue of subject matter jurisdiction; and (3) that the parties' agreement that the court had jurisdiction at least for purposes of approving the settlement and granting seniority was not "tantamount to an attempt to confer subject matter jurisdiction by consent." (IFFA Pet. at 8a).

Regarding IFFA's arguments that the settlement could not override the collective bargaining agreement, and the propriety of a grant of retroactive competitive seniority pursuant to a settlement such as this, the Seventh Circuit

said that the District Court had not abused its "discretion". The court quoted the standard for a grant of retroactive competitive seniority set forth in *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976). Finally, the court noted that it "would normally be possible" to absorb all the class members "as a result of normal attrition" in less than half a year. (IFFA Pet. at 10a).

3. *The Title VII Claims Underlying This Litigation And the Proceedings Prior to the Proposed Settlement of That Litigation.*

This litigation grows out of a "no-motherhood" policy maintained by TWA whereby flight attendants who became mothers were terminated. This policy was in effect for a number of years prior to July 2, 1965, the effective date of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*

On May 31, 1970, a charge was filed with the Equal Employment Opportunity Commission (EEOC) challenging this practice. This was the first such charge filed. A class-action complaint was filed on August 18, 1970, in the United States District Court for the Northern District of Illinois, alleging that TWA's no-motherhood policy violated Title VII. The purported class consisted of all flight attendants terminated on account of motherhood since July 2, 1965. One of the plaintiffs and class representatives was the union then representing TWA's flight attendants, the Air Line Stewards and Stewardesses Association (ALSSA). (J.A. Vol. I, pp. 4a-8a). In October of 1970, TWA entered into a collective bargaining agreement with ALSSA in which it agreed to abandon its "no-motherhood" policy. (*Id.* pp. 13a-16a, 66a).

In 1971, the class representatives and TWA agreed upon a proposed settlement under which each class member would be rehired with the amount of competitive or union seniority accrued as of the date of termination. (J.A. Vol. I, pp. 17a-26a). However, the class members

would not receive any backpay (or any other money) under the settlement. At this point the EEOC sought to intervene for purposes of blocking the proposed settlement. The District Court refused to allow intervention, and the Seventh Circuit affirmed. (J.A. Vol. I, p. 27a, 1972).[10]

In seeking court approval of the settlement, counsel for the class, who was also counsel for ALSSA, testified that a major reason for entering into the settlement was that most of the class faced a serious legal obstacle to any recovery because they were terminated long before any charge had been filed with the EEOC and, therefore, had not complied with the mandatory 90-day Title VII time limit. (J.A. Vol. I, pp. 46a-49a, 69a). The District Court subsequently approved the settlement in March of 1972. (*Id.* p. 54a).

Some class members opposed the settlement, since it did not provide for any backpay and did not grant full retroactive competitive seniority. They appealed and the Seventh Circuit reversed, in part because of a conflict it perceived between ALSSA's obligations to the class and to the (then) currently employed flight attendants. The court also directed that ALSSA be replaced as a class representative. [J.A. Vol. I, pp. 64a, 77a (1973)] Some of the successful dissidents became new class representatives.

Following the remand, TWA moved to amend its answer to include an affirmative defense that some class members were barred by the failure to file a timely charge. (J.A. Vol. I, p. 89a). The motion was sustained. (*Id.* p. 98a) (1974). In its original answer, TWA had alleged that it was without knowledge as to when a charge was filed. (*Id.* pp. 11a-12a).

In 1976 the District Court granted summary judgment in favor of all plaintiffs. (J.A. Vol. I, p. 133a). An

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[10] For several years this case was consolidated with a similar suit against American Airlines.

interlocutory appeal was taken from this ruling. (*Id.* p. 135a). During the pendency of that appeal (on April 1, 1977), IFFA came into existence and under the Railway Labor Act election procedures became the new collective bargaining representative of TWA flight attendants. (J.A. Vol. II, p. 85).

In August of 1978 the Seventh Circuit reversed the District Court again. [IFFA Pet. at 40a; published sub nom. *In re Consolidated Proceedings in the Airline Cases*][11] The Court of Appeals held that the claims of approximately 92% of the purported class are jurisdictionally barred.[12] These individuals were terminated more than ninety days prior to the filing date of the EEOC charge, and hence could not comply with the time limit in 42 U.S.C. § 2000e-5(d). Counsel for the class argued that TWA had waived its time limits defense pursuant to the aborted settlement agreement. The Seventh Circuit disposed of this argument by stating:

> The plaintiffs argue that the employer's statements at a March 17, 1972 settlement hearing constitute an express waiver of the filing requirement issue. Although it is questionable whether any concessions made at a settlement hearing should be held to constitute a waiver when the settlement is subsequently overturned, we need not reach this question as our conclusion that this filing requirement was jurisdictional precludes a finding of waiver. [IFFA Pet. at 57a.]

As previously noted, Plaintiffs and TWA each sought certiorari to review the Seventh Circuit's judgment in *Consolidated*. While those petitions were pending they negotiated a settlement whose legality is the subject of No. 80-951.

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[11] All the class representatives are included among the group whose claims are jurisdictionally barred.

[12] The time period is now 180 days. See, 42 U.S.C. § 2000e-5(e) (1972).

SUMMARY OF ARGUMENT

I.A. In its settlement with Plaintiffs TWA purported to bargain away rights which it did not own, namely, the competitive status seniority of its flight attendant employees. By entering into a collective bargaining agreement with IFFA as the statutory representative of those employees whereby TWA relinquished its control over those elements of the employment relationship which depend on the relative seniority of employees. TWA remains free to settle the case by offering the Plaintiffs $3 million or any larger amount which TWA owns; but it cannot diminish its own potential monetary liability by granting to Plaintiffs competitive status seniority inconsistent iwth the TWA-IFFA contract.

B. In settling the litigation between Plaintiffs and TWA at the expense of IFFA and the incumbent flight attendants, the courts below entered "a non-consensual consent decree." *High v. Braniff Airways, Inc.*, 592 F. 2d 1330, 1335 (5th Cir. 1979). This, of course, they lacked power to do, since the distinction between settlement and litigation is fundamental.

C. The court below relied on *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976) but that precedent cuts decisively against the challenged judgment. The point of *Franks* was that contractual seniority provisions may be overridden in favor of individuals who are entitled to such relief as the victims of discrimination. In the present case this essential condition of the exercise of the Court's remedial authority under § 706 of the Civil Rights Act has not been met.

D. The judgment below is contrary to the policies of Title VII itself, and to the national labor policy which favors the products of collective bargaining. As part of the compromise which resulted in enactment of the Civil Rights Act, § 703(h) gave "special treatment" (*Hardison*, 432 U.S. at 81) to different terms and conditions of employment pursuant to a *bona fide* seniority system. That Congressional decision is undermined by overriding the provisions of a *bona fide* seniority system such as that

in this case. Furthermore, the national labor policy as embodied in the RLA prescribes the procedures which TWA and IFFA must follow in negotiating and changing collective bargaining agreements. The judgment below allows TWA to change the contractual seniority rules without complying with those procedures.

E. The judgment below violates the Fifth Amendment. First, it took away from "A" (IFFA and the incumbent flight attendants) and gave to "B" (the Plaintiffs) the competitive status seniority and attendant benefits provided under the collective agreement. Cf. *Davidson v. New Orleans*, 96 U.S. 97, 102 (1877). Second, IFFA had "a right guaranteed to [it] by the Due Process Clause" to determine for itself whether to join in the settlement which TWA and Plaintiffs had negotiated, or whether to litigate any issue of "rightful place" which plaintiffs might raise. *United States v. Armour*, 402 U.S. 673, 682 (1971). Finally, by forcing the settlement on IFFA and depriving it of its contractual rights, the courts below have denied to IFFA "due process in the primary sense—* * * an opportunity to present its case and be heard in its support." *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 681 (1930).

II. The judgment below must be set aside for the additional reason that the courts did not have jurisdiction to enter it. The Seventh Circuit correctly determined in the *Consolidated* opinion, that the Class B plaintiffs did not satisfy the jurisdictional requirements of Title VII. If a line between "limitation" and "jurisdiction" must be drawn, the failure of 92% of the Plaintiff Class to comply with Title VII's filing requirements is jurisdictional, because the basis of the requirement Congress granted the federal courts' *power* under Title VII only after the prescribed proceedings before the EEOC have been followed. The courts below erred in allowing jurisdiction to be conferred by consent. The present case is like *United Airlines, Inc. v. Evans*, 431 U.S. 553 (1977) in that those Plaintiffs have failed to make a timely charge, and any allegedly discriminatory conduct against them must be treated as lawful.

ARGUMENT

I. THE COURTS BELOW ERRED IN OVERRIDING CONTRACTUAL SENIORITY RIGHTS IN THE GUISE OF "SETTLING" THE LITIGATION BETWEEN PLAINTIFFS AND TWA.

A. TWA, Having Agreed with the Union to Establish Competitive Seniority Rights, Could Not Destroy Those Rights Without the Union's Consent.

An initial and fundamental objection to the judgment below is that it permitted Defendant TWA to bargain away to the Plaintiffs rights which TWA did not own, namely, the competitive seniority rights of its incumbent flight attendants.

Absent a union representing its flight attendants, TWA would have had virtually unfettered freedom to grant or deny credit for length of service and attendant benefits; for in the absence of statute, "mere employment independent of the contractual conferring of special benefits upon those who have longest service records with the individual employer, creates no rights of seniority in retention in service or in reemployment." *Elder v. New York Central R.R. Co.*, 152 F.2d 361, 364 (6th Cir. 1945). This proposition is simply a corollary of the sweeping control which employers enjoy over unorganized employees. As this Court explained in *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574 (1960):

> Collective bargaining agreements regulate or restrict the exercise of management functions; they do not oust management from the performance of them. Management hires and fires, pays and promotes, supervises and plans. All these are part of its functions, *and absent a collective bargaining agreement, it may be exercised freely except as limited by public law* and by the willingness of employees to work under the particular unilaterally imposed conditions. [263 U.S. at 583 (emphasis supplied).]

Accordingly, barring legislation not here involved, seniority rights derive their scope and significance from union contracts. *Aeronautical Lodge v. Campbell*, 337 U.S. 521; *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).

Here, TWA's flight attendants exercised their right under § 2, Fourth of the Railway Labor Act ("RLA") "to organize and bargain collectively through representatives of their own choosing," and have, by election, determined that IFFA shall be that representative. See p. 15, *supra*. Following the procedures prescribed by the RLA, TWA and IFFA entered into a collective bargaining agreement, the terms of which provide, *inter alia*, seniority rights to the flight attendants, including "competitive status" seniority. That concept, as well as the concept of "benefit" seniority (which is involved in the settlement, but which is not at issue in IFFA's challenge thereto was explained in *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976):

> Seniority systems and the entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic employment system of this Nation. S. Slichter, J. Healy, & E. Livernash. The Impact of Collective Bargaining on Management 104-115 (1960). Seniority principles are increasingly used to allocate entitlements to scarce benefits among competing employees ("competitive status" seniority) and to compute noncompetitive benefits earned under the contract of employment ("benefit" seniority). *Ibid.* We have already said about "competitive status" seniority that it "has become of overriding importance, and one of its major functions is to determine who gets or who keeps an available job." *Humphrey v. Moore*, 375 U.S. 335, 346-347 (1964). "More than any other provision of the collective [-bargaining] agreement . . . seniority affects the economic security of the individual employee covered by its terms." Aaron, Reflections on the Legal Nature and Enforceability of Seniority Rights, 75 Harv. L. Rev. 1532, 1535 (1962). "Competitive

status" seniority also often plays a broader role in modern employment systems, particularly systems operated under collective-bargaining agreements:

> "Included among the benefits, options, and safeguards affected by competitive status seniority, are not only promotion and layoff, but also transfer, demotion, rest days, shift assignments, prerogative in scheduling vacation, order of layoff, possibilities of lateral transfer to avoid layoff, 'bumping' possibilities in the face of layoff, order of recall, training opportunities, working conditions, length of layoff endured without reducing seniority, length of layoff recall rights will withstand, overtime opportunities, parking privileges, and, in one plant, a preferred place in the punch-out line." [424 U.S. at 766-767, citation and footnotes omitted.]

In quoting *Humphrey v. Moore*, *supra* at 346-347, the foregoing passage in *Franks* recognizes the "overriding importance" of "competitive status seniority". See also *Teamsters v. U.S.*, 431 U.S. 324, 343-344 (1977); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 80-81 (1977); *California Brewers Assn. v. Bryant*, 444 U.S. 598, 610 (1980).

The agreement between IFFA and TWA also well exemplifies what the Court observed in *Bryant*, *id.* at 608: "Seniority systems, reflecting as they do, not only the give and take of free collective bargaining, but also the specific characteristics of a particular business or industry, inevitably come in all sizes and shapes." The seniority provisions of the agreement between IFFA and TWA are more fully described in the Statement of the Case, pp. 6 to 11, *supra*. But because of their centrality to this case it is well to call special attention to certain of the most valuable competitive status seniority rights under that agreement, which TWA would nullify in order to "settle" the Plaintiffs' claims against it:

a) Protection against furlough (layoff) and priority for recall—Article 10(B), 12(B), 12(F);

b) Protection against displacement (bumping to lower classifications and other domiciles) in order to avoid furlough—Article 12(B);

c) Preferential choice for transfer to different domiciles and work classification (including promotions)—Article 13(A) and LETTER 2;

d) Monthly preference of run selections (flight schedules) which determine rest days and times, number of days worked, days and times of work, overtime hours and earnings—Article 18-A (D)(5) and 18-B (D)(5).

Having substantially relinquished its common-law control over discharge, recall, promotions, scheduling, and the like, on the basis of competitive status seniority of incumbent flight attendants as provided in its contract with IFFA, TWA then entered into negotiations with the attorneys for the Plaintiffs in this case. And as part of that settlement TWA agreed, subject to court approval, to bestow upon the Plaintiffs competitive status seniority superior to that of the incumbents and wholly inconsistent with their collective bargaining agreement. This portion of the agreement cost TWA nothing; it was wholly at the expense of the incumbent flight attendants, whose competitive status seniority, with its attendant benefits, was subordinated to those of the Plaintiffs. The precise consequences to the incumbents cannot be determined with certainty, in part because they depend on the vicissitudes of TWA's business—most significantly on the number of flight attendants employed at any given time, and because the settlement agreement purports to override all future collective bargaining agreements which TWA might enter into—but they are serious indeed. See pp. 7-11, *supra*. TWA also contributed three million dollars, to be divided equally among Sub-Classes A and B, a figure which, while substantial on its face,

pales into insignificance compared with TWA's potential financial obligation for back pay if it were ultimately determined that both Sub-Classes A and B were entitled to prevail on the merits.[13] In turn, the primary inducement for the Plaintiffs, particularly those in Sub-Class B who, being a larger group, would receive approximately between $175 and $225 per year of lost employment (assuming that its attorneys receive the $600,000 contemplated by the settlement) was the grant of seniority at the incumbent flight attendants' expense.

Of course, TWA properly denied any liability on its part, and TWA, like both Plaintiff Sub-Classes, inevitably considered the prospects of the ultimate outcome if the action between those parties was litigated to conclusion. Absent other considerations of public policy which are not immeidately relevant, TWA was free to settle with the Plaintiffs, and to limit its own financial exposure, as long as the consideration which it provided to the plaintiffs was limited to rights and property which TWA still possessed. Thus, TWA could agree to give the Plaintiffs three million dollars or some other larger sum of its own, and IFFA would have had no objection; nor could it have, since neither it nor the incumbent flight attendants whom it represented would have been adversely affected. But what TWA could not do, was to offer as consideration to the Plaintiffs the competitive status seniority rights which it no longer possessed because of the IFFA-TWA agreement. That is simply robbing Peter to pay Paul.

Nor did the Court below have authority to enter a judgment at TWA's behest which had this effect. The Court of Appeals said, "The right to have its objections heard does not, of course, give the intervenor [IFFA] the right to block any settlement to which it objects." (IFFA Pet. 9a) The Court of Appeals thereby completely

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[13] TWA also agreed to give the Plaintiffs certain "benefit seniority", which created some additional cost to TWA, but not at the expense of the incumbents. See p. 4, *supra*.

misstated the issue. For it is not by virtue of its intervention, but because it had substantive contractual rights that IFFA was entitled to reversal of so much of the proposed "settlement" between TWA and Plaintiffs as would undermine, or even nullify, those contractual rights. Erroneously viewing the case before it as being merely a matter of the fairness of that settlement between the plaintiffs and the defendants to be determined in accordance with the general policy favoring settlements, the Court of Appeals found in "the district court's actions in approving the settlement and in granting retroactive seniority, * * * no abuse of discretion." (*Id.*, 10a)

The Court of Appeals thereby simply avoided the crucial question of whether there was any statutory basis for a judgment which purported to transfer IFFA's contractual rights to the Plaintiffs, and if so, whether such a statute would be constitutional. Indeed, the course followed below is so palpably a violation of IFFA's rights under the Due Process Clause of the Fifth Amendment, see particularly *Davidson v. New Orleans*, 96 U.S. 97, 102 (1877) and *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 681 (1930) quoted respectively at pp. 35 and 36, *infra*, that we would turn immediately to the constitutional infirmities of the judgment below, but for the "one doctrine more deeply rooted than any other in the process of constitutional adjudication, [which] is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." quoted in *New York Transit Authority v. Beazer*, 440 U.S. 568, 582 (1979). Here, there are several "statutory grounds [which are indeed) dispositive" even if one puts aside the glaring fact that TWA purported to grant to the Plaintiffs that which it had previously bargained away to IFFA.

B. The Court Was Without Power to Impose a "Settlement" On IFFA Without Its Consent.

The courts below overrode the competitive status seniority provisions of the TWA-IFFA contract on the basis that it was a fair "settlement". But IFFA never agreed to, and in fact seriously objected to that portion of the "settlement". What thus resulted was what the Fifth Circuit has accurately and succinctly described as:

> "a nonconsensual consent decree. As such it cannot stand."

High v. Braniff Airways, Inc., 592 F. 2d 1330, 1335 (5 Cir. 1979). The circumstances of the *High* case are so closely comparable to those in this case, and the reasoning of the Fifth Circuit is so sound, that it merits extensive quotation:

> Assuming that Teamster jobs and seniority are affected by the latter subparagraphs of Paragraph 15, [of the settlement agreement] we must now determine whether the procedure followed by the court below—that of imposing on the Teamsters over their objection an expanded Appendix H about which they were not consulted—was proper under the provisions of the consent decree *or otherwise*. For several reasons, we conclude that it was not proper under the decree.
>
> In the first place, the decree was contemplated to be a *consent* decree. Obviously, this implies consent given at some point, at least, to all of its significant provisions.
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> • • • •
>
> It is inconceivable to us that Teamsters could have intended to empower Braniff, the plaintiffs, and EEOC to work such a theoretically unlimited fruit-basket turnover in their bargaining unit without further consultation and concurrence by them as to the number, location, or type of jobs to be affected and the individuals to be preferred by Paragraph 15 over other Teamster members, some of them doubtless themselves members of minorities.
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> • • • •

> Nor do we think the revised Appendix H was properly imposed on a nonconsensual basis. Of course, it is entirely appropriate for parties to such arrangements as these to agree on as much as they can and call upon the court to decide the rest. *See Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978) (appeal pending). When this is properly done, what results is a partially consensual and partially litigated decree. In such an event, however, the litigated portion constitutes a judgment and must stand or fall on appeal like any other. *Id.* Considering revised Appendix H as such a judgment, we find that it cannot stand. [592 F.2d at 1334-1335, emphasis in original]

The foregoing analysis, while not of course binding on this Court, comports fully with the distinction which this Court has drawn between consent decrees and litigated judgments. In *United States v. Armour & Co.*, 402 U.S. 673 (1971) this Court explained:

> [The government's] argument would have great force if addressed to a court that had the responsibility for formulating original relief in this case, after the factual and legal issues raised by the pleadings had been litigated. It might be a persuasive argument for modifying the original decree, after full litigation, on a claim that unforeseen circumstances now made additional relief desirable to prevent the evils aimed at by the original complaint. Here, however, where we deal with the construction of an existing consent decree, such an argument is out of place.
>
> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might

> have won had they proceeded with the litigation. Thus the *decree* itself cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it. Because the defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause, the conditions upon which he has given that waiver must be respected, and the instrument must be construed as it is written, and not as it might have been written had the plaintiff established his factual claims and legal theories in litigation. [681-682, emphasis in original, footnote omitted.]

In *Armour*, the Court observed that it had "recognized these principles before" (*id.* at 682). It there relied on two prior cases involving the scope of consent decrees, *Hughes v. United States*, 342 U.S. 353 (1942) and *United States v. Atlantic Refining Co.*, 360 U.S. 19 (1959). In both those cases the Court denied to the United States relief under a consent decree which it had not obtained through litigation of the merits of the controversies which had been settled by those consents. (See 402 U.S. at 682-683.) In the present case, the Court below went a major step further than this Court refused to go in *Hughes*, *Atlantic* and *Armour*: It imposed a settlement on an unwilling third party and granted to the plaintiffs relief which they might, or might not have obtained in litigation.[14] While the Court below was plainly aware of the difference between settlement and litigation, and was heavily influenced, to say the least,

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[14] Thus the rights of the defendants in those cases were afforded greater protection than IFFA received from the lower courts in this case.

by a preference for the former, it ignored the critical distinction between settlement and litigation—the presence or absence of consent. Here, IFFA did not consent to a settling away of its contractual rights, and the Courts below were without power to impose their views of fairness and public policy on IFFA. (See IFFA Pet. 9a).

C. The Judgment Below Is Without Statutory Support

The only statutory support advanced by the Court of Appeals for affirming the District Court's Order was a general reference to Title VII of the Civil Rights Act. The Court of Appeals said:

> The Supreme Court in *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976) held that granting of retroactive seniority is ordinarily appropriate in Title VII cases:
>
> > [D]istrict courts should take as their starting point the presumption in favor of rightful-place seniority relief, and proceed with further legal analysis from that point; and that such relief may not be denied on the abstract basis of adverse impact upon interests of other employees but rather only on the basis of unusual adverse impact arising from facts and circumstances that would not be generally found in Title VII cases. *Id.* at 780. [IFFA Pet. 10a][15]

In thus relying on *Franks* the Court of Appeals completely misapplied that precedent. For the central issue in *Franks* was the scope of judicial power to remedy violations of Title VII of the Civil Rights Act, and, of most immediate significance: "whether an award of seniority relief is appropriate under the remedial provisions of Title VII, specifically, § 706(g)." (*Id.* at 762). This Court answered that question of remedial power in

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[15] The Court of Appeals inadvertently miscited the passage which it quoted from *Franks*, and which actually appears in 424 U.S. at 779, n. 41.

the affirmative. The purely remedial character of 706(g) appears clearly from its language, which the Court set forth immediately after stating the quoted question:

> *If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice* charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. . . . [424 U.S. at 762-763, n. 19, emphasis supplied]

The Court's reasoning on the propriety of seniority relief, which appears primarily in Part III of its Opinion, need not be elaborated here; it suffices to note that the heart of its analysis (including the discussion of competitive status seniority quoted earlier in this brief) is addressed to the problem of making whole the actual victims of discrimination.

The passage quoted by the Court of Appeals in its Opinion in the present case does not expand *Franks* beyond its holding as to the scope of the appropriate remedy for a violation; indeed, the word "relief" as used twice in that passage appears to be synonymous with "remedy". See 424 U.S. at 779, n.41 and the accompanying text. And it is clear from this portion of the Court's Opinion (Part V) that its function as well as that of the immediately preceding portion, Part IV, is to *qualify* (although only to a limited extent) rather than *enlarge* the basic holding of Part III that retroactive seniority relief is available under § 706(g) *to remedy violations which have been found by the Court.* In other words, Parts IV and V are the Court's response

to the objections of the separate opinions that the majority's holding too narrowly circumscribes the equitable discretion of the lower courts in formulating appropriate remedies. The paragraph relied on by the Court of Appeals herein is addressed explicitly to that point. That paragraph, and the entire *Franks* opinion, are distorted beyond recognition by treating them as a holding that parties may be granted retroactive seniority in the absence of a finding that they have been victims of a violation of Title VII.

In short, what was said in *United Air Lines, Inc. v. Evans*, 431 U.S. 553 is equally true here:

> Our decision in *Franks v. Bowman Transportation Co., supra*, does not control this case. In *Franks* we held that *retroactive seniority was an appropriate remedy to be awarded under § 706(g) of Title VII*, 42 U.S.C. § 2000e-5(g) (1970 ed., Supp. V), *after an illegal discriminatory act or practice had been proved*, 424 U.S., at 762-768. When that case reached this Court, the issues relating to the timeliness of the charge and the violation of Title VII had already been decided; we dealt only with a question of remedy. [*Id.* at 558-559, footnotes omitted; emphasis added.]

So too, in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, the Court said:

> In *Franks* we held that it was permissible to award retroactive seniority to victims of past discrimination in order to implement the strong congressional policy of making victims of discrimination whole. *Franks is not dispositive of the present case since there is no evidence of past discrimination that must be remedied.* Not only is the "make-whole" policy not present in this case, but, as we shall see, the strong congressional policy against discrimination in employment argues against interpreting the statute to require the abrogation of the seniority rights of some employees in order to accommodate the religious

needs of others [432 U.S. at 79, n.12, emphasis added. See also *id.* at 82-83, n.13.]

In this case, of course, no acts of discrimination have been "proved" (*Evans, supra*). The very presence in this Court of Nos. 78-1545 and 78-1549 on grants of certiorari to review the Seventh Circuit's earlier judgment in favor of some and against others of the respondent Plaintiffs makes that clear enough. And, as already noted, one of the principal purposes of the parties to the settlement agreement was to avoid an ultimate resolution as to whether there were any violations, and if so, what individuals may obtain relief therefor under Title VII. Indeed, the settlement agreement itself, which the District Court approved (IFFA Pet. 16a-17a) provides:

> The parties hereto agree that the execution of this Agreement by TWA is not and shall not be construed as an admission by it or deemed to be evidence of the validity of any such claims or its liability for any such claims or of any unlawful acts by it whatsoever, nor shall this Agreement or any of the terms hereof be offered or received in evidence in any civil or administrative action or proceeding as an indication of wrongdoing by TWA or of its legal position in this or other litigation. TWA expressly disclaims any liability in these lawsuits and states that it is entering into this Agreement to avoid further expenses, inconvenience and the distraction of burdensome and protracted litigation. [*Id.* at 25a]

D. The Judgment Below Is Contrary To Two Federal Statutes.

It is sufficient to require reversal of the order below insofar as it sets aside the provisions of the TWA-IFFA contract that that judgment is without statutory support. *A fortiori* that judgment cannot stand because it is actually inconsistent with the pertinent Acts of Congress. These are Title VII of the Civil Rights Act,

when properly understood, and the Railway Labor Act (hereafter "RLA").[16]

Section 703(h) of the Civil Rights Act gave "special treatment" (*Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 81, 1977), to "different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority . . . system, . . . provided that such differences are not the result of an intention to discriminate because of race . . . or national origin. . . ." *Franks* decided that notwithstanding § 703(h), seniority relief could be given to actual victims of discrimination.[17] But as we have previously shown, the Court in both *Evans* and *Hardison* distinguished *Franks*, and held that under § 703(h) seniority rights are entitled to prevail except where they must be subordinated to provide victims of discrimination with a make-whole remedy. See also the thorough discussion in *Teamsters v. United States*, 431 U.S. 324, 343-356 (1977) where the Court concluded that, "the unmistakable purpose of § 703(h) was to make clear that the routine application of a bona fide seniority system would not be unlawful under Title VII." (*Id.* at 352). Nevertheless, to the extent that it superseded the provisions of the IFFA-TWA agreement, the judgment below treats them as if they were unlawful. By depriving the incumbent flight attendants of their competitive status seniority, and the benefits which flow

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[16] See also the brief *amicus curiae* for the American Federation of Labor and Congress of Industrial Organizations which elborates this argument in greater detail.

[17] See in addition to the portions of the *Franks* opinion already discussed, Part II, 424 U.S. at 757-762, which deals most directly with § 703(h). As this Court said:

> There is no indication in the legislative materials that § 703(h) was intended to modify or restrict relief otherwise appropriate *once an illegal discriminatory practice occurring after the effective date of the Act is proved*—as in the instant case a discriminatory refusal to hire. [*Id.* at 761-762, emphasis added]

therefrom under the contract, the Court substituted its own values (favoring "settlement" at no matter whose cost) over the Congressional policy embodied in § 703 (h). That policy, as the *Teamsters* opinion developed fully (431 U.S. at 350-352) was an essential part of the compromise which made possible the enactment of any Title VII.

Additionally, the judgment below in this respect conflicts with another major element of the national labor policy, that which favors free collective bargaining. The close relationship between these two policies was explained in *California Brewers Assn. v. Bryant*, 444 U.S. 598 (1980)

> Congress passed the Civil Rights Act of 1964 against the backdrop of this Nation's longstanding labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment. See generally *Steelworkers v. Weber*, 443 U.S. 193. It does not behoove a court to second-guess either that process or its products. *Porter Co. v. NLRB*, 397 U.S. 99. Seniority systems, reflecting as they do, not only the give and take of free collective bargaining, but also the specific characteristics of a particular business or industry, inevitably come in all sizes and shapes. *See Ford Motor Co. v. Huffman*, 345 U.S. 330; *Aeronautical Lodge v. Campbell*, 337 U.S. 521. [444 U.S. at 608][18]

The statute which embodies the national labor policy favoring collective bargaining which governs the employers and union here is the Railway Labor Act, because TWA is a carrier by air, to whom the RLA is ap-

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[18] In *Steelworkers v. Weber*, 443 U.S. 193 (1979), the majority of the Court sustained an "affirmative action" program which had been agreed upon by an employer and a union, against the contention that that program was prohibited by Title VII.

plicable by virtue of § 201 thereof, 45 U.S.C. § 181.[19] Section 202 of the RLA, 45 U.S.C. § 182 imposes on such carriers by air and their employees the same duties, requirements, penalties, benefits and privileges described by § 2 (among others) of the RLA. Section 2, Seventh provides in full:

> No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act [45 U.S.C. § 156].

Seniority provisions are within "the words 'rules, or working conditions of its employees, as a class as embodied in agreements' " *Railway Clerks v. Florida E. C. R. Co.*, 384 U.S. 238 at 245 (1967). Yet the judgment below allows TWA to change the contractual seniority rules without complying with the procedures established by the RLA.

This result is directly opposed to that which was reached by the Fifth Circuit in *Myers v. Gilman Paper Corp.*, 544 F. 2d 837 (1977). There, although elaborate findings of actual past discrimination has been made and sustained, the Fifth Circuit held:

> regardless of past wrongs, a court in considering prospective relief is not automatically empowered to make wholesale changes in agreements negotiated by the employees' exclusive bargaining agents in an obviously serious attempt to comply with Title VII. Allowing such changes without findings of inadequacy in the revised agreements would conflict with the policies reflected in the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("NLRA"). [544 F. 2d at 857]

Drawing heavily on this Court's decision in *Emporium Capwell Co. v. Community Org.*, 420 U.S. 50 (1975) the Fifth Circuit observed:

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[19] In this respect there is no difference between the policies of the National Labor Relations Act and those of the RLA.

> We are reminded that while Title VII expresses an important national policy, it does not exist in a vacuum. Important national policies also emanate from the NLRA, among them the principle that terms and conditions of employment are to be shaped by the employer and the exclusive bargaining representative of its employees. [*Id.*]

A major element of the national labor policies which was deemed controlling in *Emporium Capwell* is the principle of majority rule. (See 420 U.S. at 62-70.) The "settlement" between the employer and the present plaintiffs circumvened the process of collective bargaining between the employer and the majority representative which is required by the RLA. To be sure, the terms of the RLA do not expressly address litigation between a group of minority plaintiffs or the settlement of such litigation. But it by no means follows that the policies of the RLA may simply be destroyed in those circumstances, as they were by the Seventh Circuit in this case. As the Fifth Circuit reasoned in *Gilman Paper*:

> *Emporium Capwell*, of course, did not involve negotiations in the context of a pending Title VII action. Obviously, when some of the employees become plaintiffs in a Title VII action, they acquire a status as litigants to discuss with the employer and the union the grounds upon which they are willing to settle their lawsuit. But the teachings of *Emporium Capwell* have application to the court's proper role in adjudicating Title VII actions. And the circumstances of this case point to one such application: a court may not allow the substitution of a solution for past discrimination negotiated between the employer and the plaintiffs for that achieved through collective bargaining unless it first determines that the collectively bargained solution either violates Title VII or is inadequate in some particular to cure the effects of past discrimination. [544 F.2d at 858]

And where, as here, there has been no negotiation between the employers and the statutory representative,

the Court is without authority—and violates national labor policy—by substituting its own seniority terms for those which were collectively bargained by the parties to whom the RLA assigns that power and responsibility.[20]

E. The Judgment Below Denies Petitioner Due Process of Law.

1. In the celebrated case of *Davidson v. New Orleans*, 96 U.S. 97 (1877), the Court undertook a thorough consideration of the meaning of the phrase "due process of law" as it appears in the Constitution.[21] While there have been differences within the Court as to whether the *Davidson* opinion gave to the Due Process Clause its full intended scope under the Fourteenth Amendment, one proposition there announced is beyond debate:

> It seems to us that a statute which declares in terms, and without more, that the full and exclusive title of a described piece of land, which is now in A., shall be and is hereby vested in B., would, if effectual, deprive A. of his property without due process of law, within the meaning of the constitutional provision. [96 U.S. at 102]

Yet the judgment below took away from IFFA and the incumbent flight attendants and gave to plaintiffs the competitive status seniority and attendant benefits which

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[20] The lower courts' interference with the policies of the RLA is aggravated by their approval of that portion of the settlement agreement which purports to override not only prior and current but "*future* labor agreements" (IFFA Pet. 37a, emphasis added). Thus, any future settlement governing competitive status seniority will be subject to the terms of the settlement agreement, rather than collective bargaining between TWA and IFFA as provided by Congress, particularly in § 6 of the RLA, 45 U.S.C., § 156.

[21] While the *Davidson* inquiry was prompted by the enactment of the Fourteenth Amendment, the Court's discussion, to the extent relevant here, pertains equally to the due process clause of the Fifth Amendment. See, *e.g.*, *Id.*, referring to *Murray's Lessee, et al. v. Hoboken Land & Improvement Co.*, 18 How. (59 U.S. 272, 1855).

they enjoyed under the collective bargaining agreement between TWA and IFFA. It did so, as we have seen, without any basis in statute, or other public law.[22]

2. In addition to the foregoing violation of its substantive due process rights, IFFA was denied procedural due process by the proceedings below. The lower courts purported to determine that approval of the settlement agreement "would not have an unusual adverse impact on currently employed flight attendants." (See IFFA Pet. 10a). As we have shown previously, that statement is not only clearly erroneous on the record which was actually made in the District Court, but has been shown by subsequent events to have grievously underestimated the actual impact on the incumbent flight attendants in light of subsequent events. And of course that assertion does not even address IFFA's rights under the contract or its statutory right that the procedures of the RLA be followed prior to any change in the agreement by TWA. But an even more serious vice of the judgment below is that it imposes a settlement on IFFA, rather than allowing IFFA to determine for itself whether to accept the settlement which TWA and Plaintiffs had rejected. See Point IB, *supra*. The *Armour* case, which we there quoted at length, articulated the

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[22] Two additional points bear mention in this context: 1) As *Davidson* explained, the phrase, "due process of law" has its historic origin in the phrase "law of the land" as it appeared in the Magna Carta, and meant "the ancient and customary laws of the English people, or laws enacted by the Parliament of which those barons were a controlling element." (96 U.S. at 102). The federal courts, unlike the state courts, do not have general common law jurisdiction, but are empowered to make law only in very special circumstances, none of which can even remotely authorize the abrogation of the IFFA's contract. See *Northwest Airlines, Inc. v. Transport Workers*, 49 U.S. L. Week, 4383, 4388 (U.S., April 20, 1981); *Milwaukee v. Illinois*, 49 U.S. L. Week, 4445, 4447-4449 (U.S., April 28, 1981); *Texas Industries v. Radcliff Materials, Inc.*, 49 U.S. L. Week, 4538, 4540 (U.S., May 26, 1981).

proposition—which would appear to be self-evident—that IFFA is entitled to decide for itself whether to settle or litigate. And *Armour* bears special emphasis because it affirms that the "right to litigate the issues raised [in an action is] a right guaranteed * * * by the Due Process Clause" * * * (402 U.S. at 682).

Lastly, as we have shown, *Franks* and its progeny establish that a court may override contractual status seniority provisions only in favor of individuals who have been determined to have been victims of a violation of Title VII, and who are otherwise entitled to such relief in accordance with that statute. In this case, however, the courts below have taken such action without making such a determination, and without even permitting IFFA to litigate whether the legal conditions for such relief have been met. By limiting their consideration to the fairness of the settlement agreement *qua* settlement, the courts below withheld from IFFA the right to litigate whether the plaintiffs had satisfied the legal conditions for overriding the seniority provisions of the contract. These courts thereby—denied to IFFA "due process in the primary sense,—* * * an opportunity to present its case and be heard in its support." *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 681 (1930) (Brandeis, J.)

II. THE PRIOR DETERMINATION THAT JURISDICTION IS LACKING PRECLUDES THE APPROVAL OF THE SETTLEMENT AND THE GRANT OF SENIORITY

A. The Settlement Agreement Has Improperly Allowed The Plaintiffs And TWA To Confer Jurisdiction For Their Own Limited Purposes

This settlement presents a conflict between judicial policies favoring settlement and the principle that federal courts are courts of limited jurisdiction. The District Court and Seventh Circuit have held that the policies favoring settlement allow a court to act despite a finding of a lack of subject matter jurisdiction. We disagree.

In the *Consolidated* opinion (IFFA Pet. at 40a) the Seventh Circuit held that the District Court had no subject matter jurisdiction over the claims of 92% of the putative class. Under familiar plinciples:

> This ruling was binding upon the District Court and the Circuit Court of Appeals as to changed circumstances arising after the order of confirmation and prior to our decision. When matters are decided by an appellate court, its rulings, unless reversed by it or a superior court, bind the lower court. Thus a cause proceeds to final determination. [*Insurance Group v. D. & R.G.W.R. Co.*, 329 U.S. 607, 612]

Notwithstanding the Court of Appeals opinion in *Consolidated*, the District Court exercised jurisdiction to its fullest. First, it approved a settlement of all claims, including those held to be jurisdictionally defective, under the authority of Rule 23(e) of the Federal Rules of Civil Procedure. Pursuant to the terms of the settlement, the District Court ordered that the settlement supersede the collective bargaining agreement between IFFA and TWA. It ordered that all Plaintiffs be granted full retroactive competition seniority. Further, the District Court "retained jurisdiction" to adjudicate and enforce the settlement, and to determine and award fees to attorneys for the class.

The District Court did not say whether it thought jurisdiction existed. Instead it emphasized that *Consolidated* was not final, and that a settlement was necessary:

> Contrary to the Union's assertion, the filing of the Consolidated opinion with the Clerk of the Seventh Circuit does not constitute a final judgment order, and this court is therefore not presently forbidden from exercising its jurisdiction over the claims of Subclass B members. To paraphrase Mr. Justice Stevens in United Airlines v. Evans, 431 U.S. 553 (1977), the mere entry of the Consolidated decision is an event from which no legal consequences flow until such time as the requisite mandate issues. [IFFA Pet. p. 15a]

The Seventh Circuit affirmed. It did not alter its previous opinion that jurisdiction is lacking. Rather it held that the District Court could approve the settlement and grant seniority overriding the contract because of the importance of settlement:

> We do not share the view, under the circumstances, of this case, that the parties' agreement is tantamount to an attempt to confer subject matter jurisdiction by consent. [IFFA Pet. at 8a].

Later in the opinion the court added:

> We think the principles favoring settlement of class action lawsuits remain the same regardless of whether the disputed legal issues center on the jurisdiction of the court over the action. Where, as here, the jurisdictional question is not settled with finality, parties should not be forced to litigate the issue of jurisdiction if they can arrive at a settlement that is otherwise appropriate for district court approval. [IFFA Pet. at 9a].

Thus, the Seventh Circuit has held (1) that the District Court lacks jurisdiction; but that (2) the District Court may nonetheless exercise jurisdiction; as long as (3) the exercise of jurisdiction is somehow related to the goal of encouraging settlements; because (4) it is possible that the Supreme Court could hold that the Seventh Circuit's finding that the District Court lacks jurisdiction is wrong. We have been unable to unearth a single case which supports such circular reasoning. More importantly, the opinion reverses traditional concepts regarding the role and power of the federal judiciary.

It is elementary that the parties cannot confer jurisdiction upon a federal court. Only the Constitution and Congress can create jurisdiction. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 371-372 (1978). There is a presumption that jurisdiction is lacking until it has been demonstrated that jurisdiction exists. *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U.S. 327, 337 (1895). Here, the courts below assumed that jurisdiction existed

for certain purposes despite a previous finding that it did not exist.

Jurisdiction cannot be provided by stipulation, consent, waiver, or conduct by the parties. *Mitchell v. Maurer*, 293 U.S. 237 (1934); *American Fire and Casualty Co. v. Finn*, 341 U.S. 6 (1951); *Sosna v. State of Iowa*, 419 U.S. 393 (1975). *People's Bank v. Calhoun*, 102 U.S. 256, 260-61 (1880). A challenge to the court's jurisdiction may be raised by anyone at any time, even by parties who stipulated to or argued for the existence of jurisdiction at one point, and raised the issue for the first time on appeal. *Mitchell v. Maurer, supra; Bialac v. Harsh Bldg. Co.*, 463 F.2d 1185 (9th Cir. 1972), *cert. denied*, 409 U.S. 1060 (1972); *Television Reception Corp. v. Dunbar*, 426 F.2d 174 (6th Cir. 1970). A court, whether trial or appellate, is obliged to inquire *sua sponte* into the jurisdiction of the district court, and to dismiss any claim once it is determined that the court lacks jurisdiction over it. *Mitchell v. Maurer, supra*; *City of Kenosha, Wisconsin v. Bruno*, 412 U.S. 507 (1973). The requirement of dismissal immediately following a determination of lack of jurisdiction also is built into Rule 12(h)(3) of the Federal Rules of Civil Procedure. Simply put, the law is that "the subject matter jurisdiction of the federal courts is too basic a concern to the judicial system to be left to the whims and tactical concerns of the litigants." 13 Wright, Miller and Cooper, *Federal Practice and Procedure*, § 3522 (West Pub. 1975).

Until now, there was also no doubt that the principle of limited subject matter jurisdiction likewise applied to court actions in connection with approval of settlements, class-action or otherwise. *See, United States v. Boe*, 543 F.2d 151, 158-159 (C.C.P.A. 1976); *Patterson v. Stovall*, 528 F.2d 108, 112 (7th Cir. 1976); *Fairfax Countrywide Citizens v. Fairfax County*, 571 F.2d 1299 (4th Cir. 1978), *cert. denied*, 439 U.S. 1047 (1978); *Jamison v. Butcher & Sherrerd*, 68 F.R.D. 479, 482, n. 1 (E.D.Pa. 1975); *McArthur v. Southern Airways*, 569 F.2d 276

(5th Cir. 1978).[23] *Patterson* and *Jamison* both make it clear that a court asked to approve a class action settlement must first determine if it has subject matter jurisdiction over the claims settled. In *Patterson*, for example, the Seventh Circuit said that, "[d]espite the withdrawal (of a motion to dismiss for lack of jurisdiction) the District Court would have no authority to approve the settlement had it lacked jurisdiction." 528 F.2d at 112, n.5.

Indeed, in an opinion in this very case the Seventh Circuit observed that settlements have no effect upon any lack of subject matter jurisdiction. *See Consolidated*, IFFA Pet. at 57a. When Plaintiffs argued that TWA had waived any timely-filing defense pursuant to the aborted first settlement, the Seventh Circuit held that a jurisdictional prerequisite could not be waived pursuant to a settlement. The inconsistency is obvious. In one opinion the Seventh Circuit held that parties to a settlement cannot waive a defense of a lack of jurisdiction; in another it held that it is not necessary to have jurisdiction in order to approve a settlement which alters the seniority rights of individuals who are not parties to the settlement.

Equally mystifying is the Seventh Circuit's statement that it does not agree that the settlement has allowed the parties to confer jurisdiction by consent. We are not told *why* this conclusion was reached. The opinion does acknowledge that pursuant to the settlement, "[T]he district court *was given* the *power to determine* the amount of competitive (union) seniority to grant to each woman." (IFFA Pet. at 4a, emphasis supplied). Jurisdiction *is* the power to determine. That is why Article III speaks of the judicial *power*. Without the settlement agreement, the court would not have had any power to determine seniority. Instead, it would have been bound by the hold-

[23] The Fifth Circuit has since held that the Title VII time limits are not jurisdictional. *See, Coke v. General Adjustment Bureau*, 640 F.2d 584 (5th Cir. (1981) (en banc).

ing in *Consolidated* and the literal command of Rule 12(h)(3) and compelled to dismiss the claim of each Sub-Class B member.

A settlement is, after all, both an agreement and a stipulation. Asking the court to approve and enforce the settlement, and to alter the rights of third parties pursuant to the settlement, is inviting the exercise of jurisdiction. In short, the parties to the settlement have agreed that the court could issue certain orders which it otherwise could not, due to the prior determination that jurisdiction is lacking. Thus, the only basis for the court's jurisdiction over the claims of Sub-Class B *is* the settlement agreement. In essence, the settlement agreement has been drawn to allow the parties to give jurisdiction for their own limited purposes. The jurisdiction of the court has been left to the whims and tactical concerns of the Plaintiffs and TWA, much to the dismay of the incumbent flight attendants.

We submit that the law is that a court which believes it has no jurisdiction over a claim can take no action but to dismiss that claim. A policy favoring settlements can never take precedence over a lack of jurisdiction. The principle of limited jurisdiction springs not from any "policy" but from Article III of the Constitution, which gives federal courts their power to act. It is only the existence of jurisdiction which allows the courts to formulate "judicial policies". The opinions below have, in effect, turned the process upside down.

B. The Rationale Of The Courts Below Allows The Class Action Settlement Procedures To Expand Jurisdiction

The rationale of both the District Court and Seventh Circuit is based upon the feeling that Plaintiffs and TWA *must* be allowed to settle and should not be "forced against their will" to proceed. Implicit within this reasoning are at least three incorrect assumptions: (1) the position of IFFA, if sustained, would prohibit a settle-

ment; (2) there cannot be a settlement without the assistance of the court; and (3) the class-action procedures in Rule 23 F.R.Civ.P. somehow enlarge the court's jurisdiction to act. The courts below ignored the fact that Plaintiffs and TWA need the aid of the court to alter the rights of incumbent employees who have not agreed to it pursuant to *this* settlement.

First, IFFA has never taken the position that there can be no settlement. We object only to the grant of retroactive seniority to the Plaintiffs and the overriding of IFFA's collective bargaining agreement. Indeed, if the parties had not used the settlement agreement to confer jurisdiction for the purposes of a seniority grant, there would have been no one objecting to the court's actions.

Second, there can be a settlement, with or without the court. Settlement without the Rule 23(e) approval procedure might be more difficult; it is certainly not impossible. Most settlements are handled out of court. Class members have already been asked to fill out claim forms; surely each Plaintiff could sign a release (which could even be printed on the back of the settlement check). Some Plaintiffs might refuse to sign, but that is hardly an extraordinary risk. It is quite comparable to a few class-members opting out of a court-approved class settlement. Thus, while the settlement approval provision in Rule 23(e) may be convenient, it is not indispensable.

More important, the Rule 23 class-action procedures have no affect upon the court's jurisdiction. The Seventh Circuit's opinion suggests the opposite in two ways: first, by implying that there must *be* a settlement and that there can be no settlement unless the District Court approves it pursuant to Rule 23(e); then by speculating if jurisdiction exists over the entire class by virtue of the fact that the District Court *has* jurisdiction over the claims of 8% of the supposed class. (IFAA Pet. at 8a, 9a). It has long been established that Rule 23 does

not affect jurisdiction and that in a class action the court must have jurisdiction over the claim of *each* plaintiff. *Snyder v. Harris*, 394 U.S. 332 (1969); *Zahn v. International Paper Company*, 414 U.S. 291 (1973). *Zahn* plainly states that "one plaintiff may not ride in on another's coattails." 414 U.S. at 301. See also Rule 82 which provides that the Federal Rules of Civil Procedure shall not be construed to extend the jurisdiction of the federal courts. The essence of Rule 23 is to provide a procedural mechanism for litigation of claims over which the court has jurisdiction; it does not create subject matter jurisdiction.

But the result of the opinion below is to allow a perceived necessity to approve a settlement under Rule 23(e) to take precedence over an unchanged finding of lack of jurisdiction. Insofar as the jurisdiction of the court is concerned, there is no conceivable basis for distinguishing between Rule 23(e) regarding class action settlement approval and the remainder of the Rule regarding maintenance of class actions. Accordingly, the effect of the decision is to allow Rule 23(e) to expand jurisdiction, a result forbidden by the Rules, the case law, and the Constitution.

Plaintiffs and TWA do not need the court to settle; they need the court to grant seniority and supersede the collective bargaining agreement. No settlement (without IFFA's assent) can grant seniority absent a court order, but the grant of seniority has nothing to do with class action settlement procedures. Any power to grant seniority superseding contract rights must come from Title VII, not Rule 23.

C. The Filing Of A Timely Charge With The EEOC Is A Jurisdictional Prerequisite To The Maintenance Of A Title VII Action

The Court may wish to decide the underlying jurisdictional question determined in *Consolidated* and posed in No. 78-1545: whether the filing of a timely charge with the EEOC is a jurisdictional prerequisite to the

maintenance of a Title VII action. Since we anticipate that Plaintiffs and TWA will address both sides of this issue at length, our comments will be brief.

This Court has described the requirement of filing a timely charge as jurisdictional on at least four occasions. *See, McDonell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973); *Alexander v. Gardner-Denver Company*, 415 U.S. 36, 47 (1974); *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 240 (1976); and *United Airlines, Inc. v. Evans*, 431 U.S. 553, 557, n. 9 (1977). Lower courts have disagreed on the nature of the time limit.[24]

Much of the discussion in these cases centers upon an irrelevant issue: whether the requirement of filing a timely charge is a jurisdictional prerequisite or a statute of limitations. There is no reason it cannot be both. *See*, for example, *Robbins & Myers, supra*, where this Court referred to the time limit as both a "limitations period" and a "jurisdictional prerequisite" in the same paragraph. 429 U.S. at 240. In other areas, Congress has chosen to make an amount in controversy and diverse citizenship jurisdictional prerequisites. Certainly Congress can treat compliance with a statute of limitations in the same manner.

Second, the requirement of filing a timely charge with the EEOC before proceeding to court clearly is no ordi-

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[24] Cases which have held that the time limit is jurisdictional include *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 719 (7th Cir. 1969); *Macklin v. Spector Freight Systems, Inc.*, 478 F.2d 979, 986 (D.C. Cir. 1973); *Terry v. Bridgeport Brass Co.*, 519 F.2d 806 (7th Cir. 1975); *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 246 (3rd Cir. 1975), *cert. denied*, 421 U.S. 1011 (1975); *Hinton v. CPC International, Inc.*, 520 F.2d 1312, 1315 (8th Cir. 1975); and *McArthur v. Southern Airways, Inc.*, 569 F.2d 276 (5th Cir. 1978). Cases which have held that the time limit is not jurisdictional and may be tolled include *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 475 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978); *Hart v. J. T. Baker Chemical Corp.*, 598 F.2d 829 (3rd Cir. 1979); and *Coke v. General Bureau of Adjustment*, 640 F.2d 584 (5th Cir. 1981). As is obvious from this list of cases, some circuits have vacillated on the issue.

nary statute of limitations. *Black's Law Dictionary* (Revised 4th ed., West Pub. 1968) defines a "statute of limitations" in part as a provision "declaring that no suit shall be maintained on such causes of action unless brought within a specified period *after the right accrued.*" (emphasis supplied). The right of a Title VII plaintiff to bring suit cannot accrue until *after* a timely charge has been filed with the EEOC. The time limit is more in the nature of a condition precedent to the right to sue, or as this Court has said, a "jurisdictional prerequisite." The court's jurisdiction depends on this prerequisite because the court's power to hear and determine the claim does not arise unless a timely charge has been filed.

Obviously, the right to bring suit for employment discrimination did not exist at common law. When Congress created this cause of action, it placed precise limits on the instances in which a federal court could hear and determine a claim of employment discrimination. A federal court cannot take cognizance of a private Title VII action until a plaintiff can demonstrate that she has filed a timely charge with the EEOC, and the EEOC has processed the charge and proffered to the plaintiff a notice of her right to sue. Similarly, a federal court cannot hear a diversity action unless the plaintiff can demonstrate diversity of citizenship and a minimum amount in controversy.

Third, we believe that treating the requirement of filing a timely charge with the EEOC as a jurisdictional prerequisite is in harmony with the legislative history.[25] A primary goal of Title VII is to secure voluntary compliance with the law. *Bowe v. Colgate-Palmolive Co.*,

[25] The circuits draw very different interpretations from the legislative history. The Seventh Circuit stated in *Consolidated* that "[W]e find nothing of significance to indicate that the 90-day filing requirement is not jurisdictional." (IFFA Pet. at 56a); whereas the District of Columbia Circuit stated in *Laffey* that, "Nothing in the legislative history compels us to treat these provisions as jurisdictional." 567 F.2d at 475.

supra, 416 F.2d at 719.[26] To this end Congress established a two-step process whereby the complainant first seeks relief through the conciliation process triggered by the timely filing of a charge with the EEOC. Only if such conciliation efforts fail may an action be brought in court.[27]

The procedures enacted give considerable protection to potential defendants.[28] They are assured that a charge of discrimination will be promptly filed, and that the charged party will be promptly notified; which in turn allows the charged party to voluntarily comply with the law and limit liability. In short, the entire statutory scheme is geared toward resolution out of court. A private lawsuit to remedy alleged discrimination is a last resort which can only be utilized when certain precise prerequisites are met. Where they are not met, the courts have no power to hear and determine the claim.

Moreover, the procedures which must be exhausted before bringing suit are *not* designed solely to protect *defendants*. They are, in the words of Congressman Lindsay, "designed to give due protection to *everyone*." [29] Certainly this would include innocent incumbent employees who might be asked to move over on behalf of alleged victims of discrimination. The requirement of filing a timely charge does much to limit the burden which incumbents may be forced to bear for the alleged victim. Allowing a defendant to accidentally waive the time limit defense not only for itself but also for the

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[26] See, for example, the comments of Congressman Lindsay at 110 Cong. Record 1638 (Feb. 1, 1964).

[27] See the comments of Senator Muskie at 110 Cong. Record 12617 (June 3, 1964); Senator Humphrey at 110 Cong. Record 12723 (June 4, 1964); and Senator Saltonstall at 110 Cong. Record 14191 (June 17, 1964).

[28] See the comments of Senator Morse at 110 Cong. Record 14190 (June 17, 1964): "In this instance, we have leaned over backward to protect the possible defendants by means of all the procedures referred to—those of conciliation, arbitration, and negotiation."

[29] 110 Cong. Record 1638 (emphasis supplied).

incumbent employees would emasculate the protection afforded the incumbent employees by the time limit. In this case, it would expand a time limit for an alleged victim to file her charge from 90 days to approximately 1,700 days.

In *Robbins & Myers* the Court said that in defining Title VII's jurisdictional prerequisites with precision, Congress did not leave to courts the decision as to which delays might or might not be "slight". 429 U.S. at 240. Similarly, we believe that Congress did not leave it to the courts to decide whether and in which circumstances the 90-day time limit could be converted into a period of (nearly) five years by the technical inadvertence of a charged party occurring long after the charge was filed. The description of the requirement of the filing of a timely charge as a "jurisdictional prerequisite" is accurate.

D. The Principles Of *Evans* Preclude The Action Taken By The District Court

The factual situation previously presented to this Court which most closely parallels that involved herein is that in *Evans, supra.* In that decision the portion of the flight attendant contractual seniority system sought to be set aside in order to grant seniority relief to plaintiff was a provision that seniority is irrevocably lost or broken after the separation from employment of a flight attendant (431 U.S. at 555-556, n.6).

In order to grant Plaintiffs seniority relief in the instant case, the settlement agreement purports to supersede the collective bargaining agreement, including necessarily Article 10(F) (IFFA Pet. at 63a) which provides:

> Any employee who resigns or who is dismissed from the service of the Company shall thereupon forfeit all previously accrued seniority, and the employee's name will be removed from the seniority list(s).

In view of the identical nature of the seniority provisions sought to be superseded in *Evans* and in this case, the

threefold holdings of *Evans* are not only supportive, but indeed dispositive, of the issues herein.

1. *Evans* held that a discriminatory act not made the basis for a timely charge [30] is the legal equivalent of a discriminatory act which occurred before the statute was passed, *and can be treated as lawful*; likewise, in the present case, irrespective of the Court's determination concerning the jurisdictional issue, there has been no finding of unlawful conduct. TWA has specifically not admitted to any unlawful conduct, and hence the conduct must be treated as lawful.

2. In *Evans*, after specifically noting that *Franks* was not controlling until "after an illegal discriminatory act or practice had been proved," the Court held that absent the timely filing of a charge, the court does not even reach the remedy issue; similarly in the instant case—and again irrespective of the jurisdictional question presented herein—there has been neither the finding or admission of a discriminatory act. Hence the court should not even reach the remedy issue.

3. *Evans* holds that a challenge to a neutral "seniority system may not be predicated on the mere fact that a past event having no legal significance has affected the calculations of seniority credit, even if the past event might at one time have justified a valid claim against the employer. *A contrary view would substitute a claim for seniority credit for*

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[30] The claims of Sub-Class B in the instant case were not, by the very definition of the Sub-Class, made the basis of a timely charge. Irrespective of this Court's determination of the jurisdictional issue presented herein, this fact places Sub-Class B plaintiffs in the same position as Evans. For in the ten-year history of this litigation, no court has determined that, assuming the time filing requirement to be one of limitation rather than jurisdiction, TWA waived the limitation period.

almost every claim which is barred by limitations." [431 U.S. at 560, emphasis added].

By the same token, in the case now before the Court, the past event (the termination of Sub-Class B members) can have no legal significance even if that past event might at one time have justified a valid claim against TWA. Hence, this past event, which has affected the calculation of Plaintiffs' seniority credits may not provide the basis for a challenge to IFFA's neutral seniority system.

Here, no timely charge was filed for Sub-Class B. Yet the court bootstrapped the "remedy" question to the settlement, and integrated hundreds of individuals who did not file timely charges into a neutral seniority structure to the detriment of present employees. The fact that the decision here arises out of a settlement does not diminish the controlling effect of *Evans*. The grant of seniority rests ultimately and necessarily on the order of the district court, which, even the settlement agreement acknowledges, must proceed pursuant to "all applicable provisions of law." The principles of *Evans* are "applicable," and prohibit the result reached here.

CONCLUSION

For the foregoing reasons, the judgment under review in No. 80-951 should be reversed.

Respectfully submitted,

WILLIAM A. JOLLEY
Counsel of Record
STEVEN A. FEHR
SCOTT A. RAISHER
1125 Grand Avenue
Kansas City, Missouri 64106
(816) 474-1240
Attorneys for Petitioner

Of Counsel
GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

APPENDIX

CONSTITUTION, STATUTES, AND RULES INVOLVED

APPENDIX

United States Constitution

Article III:

Section 1. The judicial Power of the United States, shall be bested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Section 2. The judicial Power shall extend to all Cases, in Law ard Equity, arising under this Constitution, the Laws of the the United States * * *

Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. § 2000e *et seq.*, provides in pertinent part:

Section 703(h), 42 U.S.C. § 2000e-2(h):

> Notwithstanding any other provisions of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin.

Section 706(d), 42 U.S.C. § 2000e-5(d) (1970): *

> A charge under this section shall be filed within ninety days after the alleged unlawful employment practice occurred. . . .

Section 706(g), 42 U.S.C. § 2000e-5(g):

> If the court finds that the respondent has intentionally engaged in or is intentionally en-

* The time period is now 180 days and is found in § 706(e) under the 1972 amendments.

gaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. . . .

Amendment V: * * * [N]o person shall be deprived of Life, Liberty or property without due process of law, * * *

Railway Labor Act

The Railway Labor Act, as amended, 45 U.S.C. § 151-188 provides in pertinent part: Section 2, Seventh: No carrier, its officers, or agents shall change the rates of pay, rules or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act.

Federal Rules of Civil Procedure

Rules 23(e): Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Rules 82: Jurisdiction and Venue Unaffected. These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. An admirality or maritime claim within the meaning of Rule 9(h) shall not be treated as a civil action for the purposes of Title 28, U.S.C. §§ 1391-93.

No. 80-951 [Consolidated with No. 78-1545]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Petitioner,

v.

TRANS WORLD AIRLINES, INC.,
Respondent,

and

ANNE B. ZIPES, PATRICIA A. SANTINI, and PAMELA J. DAILING, individually and as class representatives,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF FOR PETITIONER IN NO. 80-951

WILLIAM A. JOLLEY
Counsel of Record
STEVEN A. FEHR
SCOTT A. RAISHER
1125 Grand Avenue
Kansas City, Missouri 64106
(816) 474-1240
Attorneys for Petitioner

Of Counsel
GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY BRIEF FOR PETITIONER IN NO. 80-951 *

I. THE FUNDAMENTAL PRINCIPLES WHICH CONTROL NO. 80-951

A.

There are two bases on which an order of a court of law may terminate the contractual or other rights of one person (X) in favor of another person (Y). The first is as a result of litigation, in which it has been determined by the court that Y has been the victim of a legal wrong, and that depriving X of his right is an appropriate remedy for that wrong; it is the essence of due process of law that X may not be deprived of his rights in such a proceeding without having the opportunity to litigate whether Y has been the victim of a legal wrong which makes it appropriate to deprive X of his rights. See, *e.g.*, *Davidson v. New Orleans*, 96 U.S. 97, 102, and *Brinkerhoff-Faris Co. v. Hill*, 281 U.S. 673, 681, quoted at IFFA Br. 35, 37; *Hansberry v. Lee*, 311 U.S. 32, 44-45, quoted at p. 5, n. 5, *infra*.[1] The second basis for such a judicial

* Throughout this Reply, prior filings in this Court will be referred to by abbreviations as shown in the tabulation below:

Abbreviation	*Reference*
"IFFA Pet."	Petition for Certiorari in No. 80-951
"IFFA Br."	Brief for Petitioner (IFFA) in No. 80-951
"Pl. Br."	Brief for the Plaintiff Class
"Gov't Br."	Brief for the United States and the Equal Employment Opportunity Commission.
"TWA Br."	Brief for Trans World Airlines, Inc.
"Pl. Reply Br."	Reply Brief for Plaintiff Class.
"AFL-CIO Br.	Brief of AFL-CIO as *amicus curiae*
"EEAC Br."	Brief of Equal Employment Advisory Council as *amicus curiae*
"J.A. Vol. I" and "J.A. Vol. II"	Joint appendix of the parties in these consolidated cases, see IFFA Br. 1, n.1

[1] Only one of our adversaries, TWA, even attempts to do business with the serious due process objections to the judgment below. TWA's response is that the requirements of *Davidson* and *Brinkerhoff-Faris* were met because the "union here had the opportunity

order is the consent of X, that is, by a settlement of the litigation; again, X is entitled as a matter of due process to determine for itself whether to settle or to litigate the merits of Y's claim. See, *e.g.*, *United States v. Armour Co.*, 402 U.S. 673, 682, quoted at IFFA Br. 25-26, 37.[2]

B.

We now apply these fundamental principles to this case. The union, IFFA, is in the position of X; it had a contractual right by virtue of its collective bargaining agreement with TWA, which established the seniority rights of employees in the collective bargaining unit covered by the agreement. That contractual right, like other contractual rights, is not absolute; it is subject to defeasance by the sovereign by operation of positive law. Specifically, this Court has held in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, that where a court has adjudicated that individuals are victims of discrimination in violation of Title VII of the Civil Rights Act, the Court may, in the exercise of its remedial powers under § 706(g) of that Act, award to those individuals the

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to appear and be heard" (TWA Br.31; see also *id.* at n. 14). But the union did not have the opportunity to be heard *on the issue of whether the plaintiffs had been the victims of a legal wrong*, and were thus entitled to relief overriding the seniority provisions of the collective bargaining agreement. As we explain in the text, *infra*, it was on such a finding that the power of the District Court to enter the seniority order depended, absent consent by the union.

[2] Here again our adversaries' failure to respond is revealing. Only plaintiffs' brief refers to *Armour*, quoting it for the point that settlements constitute a compromise, and are entered into by the settling parties on the basis of their estimates of cost savings and elimination of risk. This proposition is uncontroverted, but has nothing to do with the issues in this case. For, while it undoubtedly explains why plaintiffs and TWA determined to settle the case *between themselves*, the sentence quoted by plaintiffs does not deal with the question whether they were empowered to make that judgment for IFFA (or to empower the court to make that judgment on the basis of what is "fair and reasonable"). That they could not do so is plain from *Armour*, which we quoted, and particularly this Court's affirmation that the "right to litigate the issues raised [is] a right guaranteed * * * by the Due Process Clause" (402 U.S. at 682).

seniority position which they would have had but for that violation, notwithstanding any contrary provisions in the collective bargaining agreement. The Court has made clear, both in *Franks* itself, and in subsequent cases (see IFFA Br. 27-30, AFL-CIO Br. 11) that the remedial power of a court to award such "rightful place" seniority is predicated on the determination that the beneficiaries of the seniority award "have carried their burden" (*id.* at 772) of showing that they are the victims of a legal wrong; this is clear also from the language of § 706(g), quoted in *Franks* (*id.* at 762-763, n. 19, see IFFA Br. 28), and in the very idea of a judicial remedy. Further, a union whose contractual rights are subject to being overridden under the *Franks* principle is entitled to litigate the question whether the conditions of a *Franks* remedy have been satisfied, see AFL-CIO Br. 12-14, discussing *Teamsters v. United States*, 431 U.S. 324, 356, n. 43.

Specifically, in this case, litigation of the question whether the plaintiffs have a legal entitlement to "rightful place" relief turns on two issues—whether TWA's pregnancy-motherhood policy constitutes sex discrimination in violation of Title VII, and whether plaintiffs' claims are time-barred, for a "discriminatory act which is not made the basis for a timely charge is the legal equivalent of a discriminatory act which occurred before the statute was passed." (*United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558). IFFA was entitled to litigate both of those issues before the Court could exercise its authority under § 706(g) to enter an order overriding the contractual seniority provisions. IFFA was not given that opportunity.

Alternatively, a union may by settling (or by limiting the scope of its defense against particular plaintiff-individuals or subgroups) relinquish its contractual rights in whole or in part. This too is recognized in *Franks*, 424 U.S. at 778-779, quoted and discussed at pp. 18 to 20, *infra*. Nothing in the language or policy of Title VII purports to diminish that right by a scintilla; nor could it constitutionally do so. Much is said

in the briefs on the other side concerning Congress' "strong preference for encouraging voluntary settlement of employment discrimination claims", *Carson v. American Brands, Inc.*, 450 U.S. 79, 88; *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44. These cases, relied on in each of the briefs on the other side[3] only reinforce our view of Title VII, for of course, the Court in both instances used the word "voluntary" in describing the settlement and conciliation which Congress favored.

C.

Much confusion is traceable to the class nature of the plaintiffs' suit, for the courts below determined whether the settlement was to be imposed upon the defendant IFFA by applying the standard for approving or disapproving a settlement over the objection of members of a *plaintiff* class (see IFFA Pet. 4a-5a, 16a-19a). That confusion comes about because of the failure to appreciate the fundamental difference between situations in which plaintiff class members' rights are at issue and those in which the defendant's rights are at issue.

Inquiry into the fairness of a settlement to absent members of a class assumes that the plaintiffs are a class for purposes of F.R. Civ. Rule 23, that is, that the absent members are adequately represented by the named plaintiffs who are before the court. If that condition is not met, the absent members cannot be bound by the settlement no matter how fair and reasonable it is determined to be, and their claims cannot be barred.[4] Thus, the court's determination that the settlement is fair and reasonable is not a substitute for, but supplements the class members' due process rights. For, "[I]t is familiar

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[3] Pl. Br. 38, n. 87; Gov't Br. 24, 25, 26, text and note at n. 28; TWA Br. 16-17; EEAC Br. 6, 8.

[4] In particular cases the court's determination of the adequacy of the representation and the fairness and reasonableness of the settlement may occur simultaneously, because objectors will frequently oppose a settlement on both grounds. But what matters for present purposes is that a settlement will not be approved unless adequacy of representation, and the fairness and reasonableness of the settlement are both established.

doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present," (*Hansberry v. Lee*, 311 U.S. 32, 42-43). But *Hansberry* also made clear that adequacy of representation is the constitutional *sine qua non* for binding the absent members, see *id.* at 44-45 quoted in the margin.[5] The same principles of due process which preclude the entry of a binding judgment against absent members of a class who are not adequately represented, forbid the entry of such a judgment against a nonmember of the class without affording it the opportunity to litigate the merits.

Indeed, that was the precise situation in *Hansberry*, where the plaintiffs in the original suit (to which binding effect was sought to be given in the second suit) had brought a plaintiffs' class action, but had not named a defendant class or sought relief against anyone other than the original named defendants, see *id.* at 45-46. Here, the District Court could have been under no illusion that either the plaintiffs (who proposed the entry of the seniority order) or TWA (which, in compliance with the settlement agreement at the very least failed to oppose such order) was representing the interests of the

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[5] Justice Stone wrote:

> It is one thing to say that some members of a class may represent other members in a litigation where the sole and common interest of the class in the litigation, is either to assert a common right or to challenge an asserted obligation. It is quite another to hold that all those who are free alternatively either to assert rights or to challenge them are of a single class, so that any group, merely because it is of the class so constituted, may be deemed adequately to represent any others of the class in litigating their interests in either alternative. Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires. The doctrine of representation of absent parties in a class suit has not hitherto been thought to go so far. [311 U.S. 44-45.]

union; nor do either of these parties contend in this Court that they did so. (But see Gov't Br. 28, n. 31 discussed at pp. 9-10, n. 10, *infra.*) Thus, the last sentence of Justice Stone's opinion for the Court in *Hansberry* is very much in point:

> For a court in this situation to ascribe to either the plaintiffs or defendants the performance of such functions on behalf of petitioners here, is to attribute to them a power that it cannot be said that they had assumed to exercise, and a responsibility which, in view of their dual interests it does not appear that they could rightly discharge. [311 U.S. at 46]

And the Court's conclusion in *Hansberry* that the petitioners there were deprvied of due process of law by the entry of a judgment affecting their rights without allowing them to litigate the issues on which those rights depend,[6] compels the conclusion that the judgment below deprived petitioner of due process of law. Because of the total absence of statutory authority for the judgment under review that constitutional infirmity need not be the basis for reversal. Nonetheless it is well to have in mind, in considering the submissions which have been made in support of that judgment, just how far that judgment departs from established processes of adjudication.[7]

II. RESPONSE TO SEPARATE OPPOSING BRIEFS

A. *The Merits.*

Individually, and collectively, the points made by our adversaries insofar as they discuss on the merits the

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[6] There it was the defense that the restrictive covenant had never become effective because of an inadequate number of signatures, see 311 U.S. at 38; this was the issue that had been determined in the original suit to which the Illinois courts gave *res judicata* effect by the judgment reversed in *Hansberry*.

[7] Moreover, even if there were a statutory argument in favor of that judgment, "Congressional solicitude for fair procedures, absent explicit statutory language to the contrary" would militate against such an interpretation. *Califano v. Yamasaki*, 442 U.S. 682, 693, citing *Greene v. McElroy*, 360 U.S. 474, 507-508.

issue of the Court's power to override the seniority provisions of the collective bargaining agreement reduce to two propositions: 1) The order is valid as "rightful place" seniority relief; and 2) there is a policy favoring settlement of Title VII actions which would be frustrated if the union were permitted to insist on litigating whether plaintiffs have a Title VII right to have the collective agreement overridden in their favor. Both of these propositions are so patently without merit that it would unduly extend this brief to respond in detail to the various formulations in the three briefs on the other side.

1) Contrary to plaintiffs' principal contention, Gov't Br. 31, and TWA Br. 21-23, ¶¶ (b)-(d), the order cannot be sustained on the basis that subclass B is legally entitled to the relief awarded.[8] The presence in this Court of Nos. 78-1545 and 78-1549 should suffice to make it clear that the factual predicate for such relief—a judicial determination that there has been illegal discrimination—has not been satisfied. (See also pp. 10-18, *infra*). And *Franks* and its progeny make clear that such a determination is the statutory condition for a contested award of "rightful place" seniority overriding a contract. See pp. 2-3, *supra*. The objection at Gov't Br. 25-26 that we give "too much emphasis to the particular facts of *Franks*" is specious; the single fact we relied on was that the plaintiff had established illegal discrimination—proof which was treated as the predicate for the remedy

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[8] Gov't Br. 31 says:

"[T]he district court had already granted summary judgment on liability, and that holding had been affirmed." As regards the claims of the Subclass B members, that statement is wrong. The Government apparently defines the term "liability" in some abstract sense, without regard to the timeliness of the claims in question. To do so is contrary to *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558, quoted at p. 3, *supra*. In simple terms, there is no "liability" for time-barred claims, and an appellate decision, as here, that claims are untimely is not affirmance of a "judgment on liability." Thus, it distorts meaning to refer to the order on review as awarding "rightful place" seniority (Gov't Br. 29 n. 30; 30 n. 33).

in the *Franks* opinion itself (424 U.S. at 762-770) and in the other decisions of this Court quoted at IFFA Br. 27-30.[9]

2) Reliance on Title VII's policy concerning settlements at Pl. Br. 38-39; Gov't Br. 25-27; TWA Br. 16-18 is wholly misplaced because that policy is one favoring *voluntary* settlements, see pp. 3-4, *supra*. Neither Title VII nor any other law give a court power either express or implied (TWA Br. 17) to impose a "nonconsensual consent decree". *High v. Braniff Airways*, 592 F.2d 1330, 1335 (5 Cir.).

Plaintiffs and TWA complain because IFFA would require them to litigate, rather than settle; but it is IFFA that is truly aggrieved—for plaintiffs and TWA would have the Court deprive IFFA of its contractual rights without affording IFFA the opportunity to litigate the issue of liability. Thus, what is deprecated as "union veto power" over settlement (Gov't Br. 28, 31) is only that which, in the nature of our system, any party has

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[9] *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (Gov't Br. 25), while not involving seniority, likewise treats the Court's remedial power as depending on an established violation of law. See also *University of California Regents v. Bakke*, 438 U.S. 265, 307-309 (Opinion of Powell, J.).

Myers v. Gilman Paper Co., 544 F.2d 837, on rehearing, 556 F.2d 728 (5th Cir.), *certiorari dismissed*, 434 U.S. 801, refutes the proposition that a court may impose a retroactive seniority remedy overriding union contractual rights based not upon a judicial finding of violation but upon a settlement agreement between plaintiffs and the employer. In *Myers*, the seniority remedy which the court approved (Gov't Br. 30, n. 33) *was* based upon a judicial finding of violation. The Fifth Circuit's subsequent vacation of the decision insofar as it allowed even that relief confirms that the source of the judicial power to enter the relief in the first instance was not the settlement agreement but the judicial finding of a Title VII violation. See also that court's discussion of *Myers* in *Southbridge Plastics Division, Etc. v. Local 759, Etc.*, 565 F.2d 913, 916 (5 Cir.). Of course, neither TWA nor the government addresses, much less impeaches, the *reasoning* of *Myers*, quoted at IFFA Br. 33-34, which we commend to this Court.

before his rights may be taken from him: the power to defend his rights through the adjudicative process. It is entirely true, that if a union is unwilling to give up its contractual rights voluntarily "Title VII plaintiffs to secure seniority relief * * * could be required under IFFA's theory to litigate to the bitter end even the most patently meritorious claims." (Gov't Br. 27). That, as Justice Brandeis long ago taught, is the nature of our legal system: "Law suits * * * often prove to have been groundless; but no way has been discovered of relieving a defendant of the necessity of a trial to establish the fact." (*Myers v. Bethlehem Corp.*, 303 U.S. 41, 51-52). Plaintiffs are in no better position—their claims may be "patently meritorious" and the defenses may be "groundless", but no way has been discovered—or should be created here—of relieving a plaintiff from the necessity of a trial to establish that through the normal legal processes.[10]

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[10] The possession of that power does not however mean, as the Government suggests, that settlements will not occur. (Indeed, plaintiffs and TWA here have agreed to settle even if retroactive seniority is disapproved; so can plaintiffs and employers settle other Title VII claims without the presence of the union as long as they do not interfere with collective bargaining rights.) The Union has such incentives to settlement as are normally present: the desire to avoid the expense of litigation; the uncertainty of the result of litigation; and, in a Title VII case, the possibility of having to pay the plaintiffs' attorneys' fees.

The government advances two reasons why "it is unlikely that employers will thoughtlessly bargain away seniority rights simply to settle litigation, as IFFA suggests" (Gov't Br. 28, n. 31). Of course, we did *not* suggest that TWA acted "thoughtlessly"; on the contrary, we observed at IFFA Br. 21-22 that by the agreement TWA would eliminate a very substantial financial liability, albeit only a potential one. These are considerations which TWA was entitled to consider in its own "self interest" (Gov't Br. 28, n. 31) in deciding whether it wished to settle (*Armour, supra*). But the union's right to determine whether to settle or not has the same dignity under law. The government suggests the contrary by arguing (Gov't Br. 29): "Where, as here, a union faces no prospect of [financial] liability, and is not therefore subject to countervailing influences, the union's course of action will be dictated by its members' interests." But the union is "subject to

B. *Plaintiffs' Attempted Evasion Of The Merits.*

1. Plaintiffs would have it appear that the Order of the district court awarding retroactive seniority, which was affirmed by the Court of Appeals in the judgment under review in No. 80-951, was based not on the Settlement Agreement between plaintiffs and TWA but on the district court's finding of a violation. (Pl. Br. 18-24). This is demonstrably false, as shown by the orders of the district court which we reproduce in pertinent part in the margin.[11]

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countervailing influences" (see above), and in any event has the right to make its own choice and act accordingly. It has that right both under ordinary legal principles and under the policies of the Railway Labor Act. The employer is not the bargaining representative of the employees; nor can it by agreement with another litigant empower a Court to determine whether the enforcement of collective bargaining rights is "fair and reasonable."

[11] The district court entered two simultaneous orders on November 8, 1979. The first was entitled "Order Approving Settlement and Dismissing Actions":

> The court has considered the proposed Settlement Agreement, as amended, for the compromise of these actions and has considered the written and oral presentations of the parties under Rule 23(e), F.R.C.P. The court finds that proper notice of the proposed settlement and the hearings thereon was given to the members of plaintiff class and Subclasses A and B; and that no class member objected to the settlement. The court also finds that the settlement agreement is fair, reasonable, and adequate for the parties and Subclasses A and B.
>
> * * * *
>
> The court retains jurisdiction:
>
> (a) to determine the total amount of seniority and credit for length of service (both accrued and retroactive) for re-employed class members as provided in Section V B of the Settlement Agreement as amended,
>
> (b) to enforce the terms of the Settlement Agreement and the orders entered herein, including this Order,
>
> (c) to adjudicate any disputes which may arise concerning the interpretation of any part of the Settlement Agreement, including matters relating to the claims of eligibility of class members, and .... [IFFA Pet. 16a-17a.]

The Court also entered an "Order Awarding Seniority" which provides in pertinent part as follows:

We note specifically that the court referred to both § 706(g) of the Civil Rights Act of 1964, its remedial provision, and to the Settlement Agreement. While the latter reference clearly refutes the plaintiffs' contention that the Order was not based on the Settlement Agreement (as does much of the other language of the Orders we have quoted), the reference to § 706(g) cannot be taken as indicating that the district court was entering the Order on the basis that it was remedying a found violation of Title VII. There is no recitation to that effect in either of the Orders, and the references to the Settlement Agreement would have been entirely superfluous if the district court had been remedying a statutory violation.

The court having considered the evidence, testimony and briefs which have been submitted in connection with the issue of seniority, pursuant to Section 706(g) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g) and Section V of the Settlement Agreement, as amended, and the court finding that full restoration of retroactive seniority will not have an unusual adverse impact upon currently employed flight attendants in a manner which is not typical of other Title VII cases, it is ordered that each class member who is now employed as a TWA flight attendant or who will hereafter become employed as a flight attendant by TWA under the Settlement Agreement shall be credited with the amount of union (occupational) seniority to which she was entitled on the date on which her employment was terminated, plus credit for such seniority for the "compensation period", as defined in the Settlement Agreement (at page 3), less the deductions provided therein (at p. 8), the terms of which are incorporated by reference and are adopted as part of this Order.

The court having approved the Settlement Agreement in a separate order, it is ordered that this case be, and is hereby, dismissed. * * *

However, this court hereby retains jurisdiction:

(a) to enforce the terms of the Settlement Agreement and the orders entered herein, including this Order,

(b) to adjudicate any disputes which may arise concerning the interpretation of any part of the Settlement Agreement, including matters relating to the claims of any eligibility of class members, and . . . [IFFA Pet. 18a-19a].

Moreover, the entire posture of the litigation is contrary to the plaintiffs' interpretation of what the district court did. For, when Judge McGarr, then the District Judge in this case, entered his October 18, 1976 Order awarding summary judgment to plaintiffs against TWA on the merits, he did not decide the scope of the relief to which the plaintiffs were entitled, but instead certified the case to the Court of Appeals pursuant to 28 U.S.C. § 1292(b). (J.A. I, 133a-135a). It was on that appeal that the Court of Appeals affirmed the district court with respect to subclass A, but reversed as to subclass B. (IFFA Pet. 40a-59a). Plaintiffs and TWA then filed petitions for certiorari to review that judgment (Nos. 78-1545 and 78-1549 in this Court). While those petitions were pending they asked this Court to hold them in abeyance in order that they might undertake settlement negotiations. When those negotiations culminated in an agreement between those parties, they invoked the jurisdiction of the district court for the purpose of approving that settlement. It is in this context that the union was granted leave to litigate the question whether the Settlement Agreement should be approved, but not to litigate the merits of the underlying Title VII case. By an order of September 14, 1979, the court (now Roszkowski, J.) overruled the "Union-Intervenor's objection to this court's jurisdiction and authority to approve the proposed settlement agreement" (IFFA Pet. 13a). That order too, makes clear the basis on which the district court was proceeding, and further confirms that its Orders, less than two months later, were orders approving the Settlement Agreement, rather than remedying a violation which it had previously found, but as to which the Court of Appeals had reversed its decision with respect to subclass B.

At the outset of its opinion affirming the awarding of retroactive seniority, the Court of Appeals stated that the

> . . . issue in this appeal is whether the district court properly approved a settlement agreement

> terminating almost a decade of litigation regarding the claims of the plaintiffs that defendant TWA's policy between 1965 and 1970 of terminating female flight attendants who became mothers was sex discrimination in violation of plaintiffs' rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* [IFFA Pet. 2a]

The Court of Appeals' description of the proceedings which culminated in the entry of the orders on appeal is also wholly inconsistent with plaintiffs' version. (See IFFA Pet. 4a.) And its discussion of the merits of the appeal makes clear that it affirmed the judgment on the basis that it was a settlement, rather than remedy for a violation of the rights of Subclass B, whose claim it had previously rejected as time-barred. (*Id.* at 4a-10a.)

2. We have shown that the courts below purported to find the authority to impose retroactive seniority in favor of subclass B in the settlement agreement, not in § 706(g). We now show that authority *could not* have derived from § 706(g), for the necessary predicates for imposition of a remedy under § 706(g) were lacking here. In order to provide relief under § 706(g), it is not enough that the court find the employer to have acted in a manner inconsistent with the substantive commands of Title VII; it is necessary as well that the employer's conduct be challenged in a manner permitting judicial enforcement of Title VII. Where the latter condition is absent—where, for example, the employer's conduct was not challenged within the time limits specified in Title VII—a court is without power to impose *any* remedy under § 706(g). *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 558-559. And there has not been—*and there cannot be*—a determination that the employer's conduct was challenged in *this* case in a manner permitting imposition of a remedy under § 706(g) for the benefit of subclass B. Because the procedural history of this case is so complex, we demonstrate this with some care.

It is correct, to be sure, that both the district court and the court of appeals have found TWA's pregnancy-motherhood rule to be inconsistent with the substantive commands of Title VII. While that question is not finally resolved—this Court has granted TWA's petition for certiorari to review that holding, No. 78-1549—the union as a matter of policy has no quarrel with the result flowing from that holding. The union's objection to the settlement agreement was not with its providing retroactive seniority to the victims of TWA's rule on whose behalf a timely challenge was made, but with its providing such seniority to those who—because no timely challenge had been made—no longer had a claim for relief under Title VII.

Plaintiffs and the Government correctly note that the *district court* found a timely challenge here: that court deemed the violations "continuing" in nature, and thus concluded that even as to those in subclass B there was a timely challenge permitting judicial enforcement of Title VII. In view of its finding of a timely charge, the district court had no occasion to discuss whether the filing of a timely charge is a jurisdictional prerequisite, nor whether, if it is *not* a jurisdictional prerequisite but only a statute of limitations, there were circumstances present here that would justify the claim despite noncompliance with the time limits. In particular, the district court had no occasion to, and did not, address the question whether TWA had waived Title VII's requirement of a timely charge.

On appeal, the Seventh Circuit, *prior to the entry of the settlement agreement herein*, reversed the district court's holding that the alleged violations were "continuing" in nature, relying in part upon this Court's intervening decision in *United Air Lines v. Evans, supra.*[12] As a result, the Seventh Circuit ruled that no timely charge

[12] Since the District Court's finding of a violation was at that time totally without legal effect, the description of the case at AFL-CIO Br. 10 is entirely accurate. Plaintiffs' contrary contention, and their effort to dismiss that brief as "irrelevant to this case" (Pl. Br. 22, n. 38), is spurious.

was filed in this case on behalf of subclass B. That ruling has not been challenged in the petitions to this Court; it is thus definitively resolved that no timely charge was filed in this case on behalf of those persons.

The Seventh Circuit's reversal of the district court on the timely charge question compelled it to reach an issue the district court had not reached: whether there can be circumstances in which a Title VII claim can be adjudicated despite the absence of a timely charge, i.e. whether compliance with Title VII's time limits is a "jurisdictional prerequisite" to securing adjudication and remediation with respect to an alleged violation of Title VII. The Seventh Circuit concluded that compliance with the time limits *is* a jurisdictional prerequisite; that conclusion perforce compelled its ultimate holding that the claims on behalf of the subclass B cannot be adjudicated (and thus cannot be remedied under § 706(g)) in this action. In light of its holding on the "jurisdictional prerequisite" issue—a holding that leaves no room for "waivers" of Title VII's time limits—the Seventh Circuit had no occasion to, and did not, decide whether TWA actually had "waived" the time limits.

This, then, was the posture of this case at the time the district court imposed retroactive seniority for the benefit of subclass B: it had been conclusively resolved that no timely charges had been filed on behalf of those employees; and it had been decided (subject to possible review by this Court) that in the absence of a timely charge there can be *no* circumstances empowering a court to adjudicate a claim of violation and provide remedies therefor. Certainly, the "law of th[is] case" as of the date the district court ordered retroactive seniority for subclass B did not support its power to do so under § 706(g). The question that remains, and to which we now turn, is whether the decisions this Court may make on the issues now pending could establish, *post facto*, that the district court indeed *did* have power to enter that remedy under § 706(g).

Of course, if this Court were to affirm the Seventh Circuit's ruling that compliance with the time limits is a jurisdictional prerequisite, that would be the end of the matter. It would then have been conclusively determined that the district court was without power under § 706(g) to impose a remedy for the injuries suffered by subclass B. But even if this Court were to *reverse* the Seventh Circuit, and hold that the time limits are not jurisdictional, it would remain true that the district court had no such power under § 706(g). In that event, the question would remain whether plaintiffs have shown an adequate justification for avoiding the time limits. There are three possible dispositions this Court might make with regard to TWA's alleged waiver of a timeliness defense:

(i) This Court might reach the "waiver" issue and decide, as TWA contends, that TWA did *not* waive its time limits defense.[13] In that event, again, it would be

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[13] We believe that TWA did *not* waive its time limits defense. Plaintiffs have two contentions on the waiver issue: (1) TWA did not raise this defense in its original Answer (though it did in an Amended Answer); and (2) TWA waived the defense pursuant to the aborted 1971 settlement. The second contention was rejected in *Consolidated*, IFFA Pet. at 57a, on the sound proposition that a party cannot be bound by a concession made as part of a settlement that is subsequently overturned. The first contention is wrong for several reasons demonstrated in TWA's brief. First, in its original Answer, TWA stated that it was without sufficient knowledge to answer Plaintiffs' contention that the time limits were met, and this had the effect of a denial. J.A. Vol. I, pp. 11a-12a; Rule 8(b) F.R.Civ.P. TWA cannot be criticized for not affirmatively raising this defense if it was without knowledge at that time as to whether Plaintiffs had complied with the time limit. Second, regardless of whether the time limits are jurisdictional, it clearly was the law of the Seventh Circuit at the time TWA filed its original Answer that the time limits were jurisdictional (and therefore could be raised later even if not specifically raised in an Answer). Thus, TWA cannot be penalized for not raising timeliness initially. See, *Choate v. Caterpillar Tractor Co.*, 402 F.2d 357,

conclusively established that the district court was without power to provide a remedy under § 706(g).

(ii) This Court might decline to reach the "waiver" issue, preferring that it be addressed in the first instance by the district court. In that event, it might appear at first blush that the question of the district court's power under § 706(g) should be remanded with the waiver issue, to depend on the latter's determination. But as explained in (iii) below, the court's power under § 706(g) to impose retroactive seniority does *not* depend alone on whether *TWA* waived the time limits rather, it depends as well on whether the *union* waived the time limits; and the absence of power to impose retroactive seniority is conclusively determined by the fact that *the union did not waive the time limits.*

(iii) This Court might reach the waiver issue and decide that TWA *did* waive the time limits. Even in that event, the district court would have been without power under § 706(g) to impose retroactive seniority in derogation of the collective agreement. The union, as a party to the agreement, was required to be joined as a party to any proceeding in which derogation of its agreement was sought; and as a party to the action, the union was entitled to assert any defense that would protect its agreement. Thus, absent a waiver *by the union* of a time limits defense, the court had no authority to proceed on claims that were time-barred and impose a remedy therefor that takes from the union the fruits of its contract (see p. 3, *supra*).

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359 (7 Cir.) and *Bowe v. Colgate Palmolive Co.*, 416 F.2d 711, 719 (7 Cir). Third, TWA *did* raise the defense in its Amended Answer. Those courts holding that compliance with the time limit is not jurisdictional have allowed the defense to be raised as late as at trial unless plaintiffs can demonstrate that they were severely prejudiced by the *delay*. See, for example, *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429, 476 (D.C.Cir.); *Pierce v. County of Oakland*, —— F.2d ——, 26 FEP 450 (6 Cir. 1981).

In sum, the rulings at the time the district court imposed retroactive seniority established an absence of power in that court to take that action under § 706(g), and none of the alterations that this Court might make in those rulings in the cases now before it could result in vindicating, *post facto*, the district court's power to have taken that action.

3. Plaintiffs seize upon the fact that IFFA has not contested the award of retroactive seniority relief to members of subclass A. They state, quite incorrectly:

> . . . With respect to subclass A, the union therefore must concede that the court's order does not "change the contractual seniority rules," deprive the union "of its contractual rights," nullify "valuable competitive status seniority rights" of incumbents, or override "IFFA's collective bargaining agreement." [Pl Br. 41, footnotes omitted].

We concede none of these propositions; nor is such a concession implicit in our position. The court's order does change the contractual seniority rules in favor of subclass A, and has all the other consequences described but denied by plaintiffs. Absent approval of such action by the union, the award in favor of subclass A would be subject to the same legal objection as the award to subclass B—that it is an order that the court was without statutory or constitutional authority to enter *as a settlement* without the union's approval. But the union has chosen, as a matter of policy, not to object to awarding retroactive seniority to subclass A, thereby waiving its contractual rights to that extent. The union's authority to do so is quite clear under *Franks*, *supra*. The Court there said:

> The Court has also held that a collective-bargaining agreement may go further, enhancing the seniority status of certain employees for purposes of furthering public policy interests beyond what is required by statute, even though this will to some extent be detrimental to the expectations acquired by

> other employees under the previous seniority agreement. *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953). And the ability of the union and employer voluntarily to modify the seniority system to the end of ameliorating the effects of past racial discrimination, a national policy objective of the "highest priority," is certainly no less than in other areas of public policy interests. [424 U.S. at 778-779].

Nothing required the union to choose, in exercising its contractual rights, between objecting to the grant of retroactive seniority for all the plaintiffs, or for none of them. The union's right to insist that the contractual seniority provisions are not to be overridden in favor of subclass B without a final, judicial determination that this subclass was entitled to such relief under Title VII is not forfeited by its acquiescence in the award of such relief to subclass A.

Plaintiffs seek to minimize the difference between the subclasses, and assert that the "union's protest [to granting seniority to the members of subclass B] is not rooted in principles of collective bargaining" (Pl. Br. 41). But the "protest" which is before this Court is to a judicial order which overrides a collective bargaining agreement, and thus is indeed rooted in principles of collective bargaining, as well as the more general and fundamental principle that the courts below were without statutory or constitutional authority to deprive the union of any of its contractual rights without its consent in the guise of effectuating a settlement agreement between two other parties. The soundness of the union's choice between subclass A and subclass B in determining to what extent the union would assert its contractual rights is not for the plaintiffs to question, because it is the union's contractual right, and not that of the plaintiffs. But though it is clearly irrelevant, we have no hesitancy in informing the Court as to the reason for the union's course. IFFA believes that TWA's pregnancy-motherhood policy was wrong. But IFFA believes also,

both as a matter of policy and law that the claims of subclass B are time-barred. The very purpose which is served by a statute of limitations is repose, and the union believes as a matter of collective bargaining policy that the expectations of the incumbent employees under the seniority provisions of the agreement outweigh any equities on the part of the members of subclass B.

CONCLUSION

For the reasons stated herein, and in our opening brief, the judgment of the Court of Appeals in No. 80-951 should be reversed.[14]

Respectfully submitted,

WILLIAM A. JOLLEY
Counsel of Record
STEVEN A. FEHR
SCOTT A. RAISHER
1125 Grand Avenue
Kansas City, Missouri 64106
(816) 474-1240
Attorneys for Petitioner

Of Counsel
GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

[14] Reversal of the judgment in No. 80-951 would leave intact the settlement agreement between plaintiffs and TWA, since that agreement sought, but was not conditioned upon, approval of retroactive seniority to the plaintiffs. On that basis it would be appropriate for the Court to dismiss the writs of certiorari in both Nos. 78-1545 and 78-1549.

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No. 80-951

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

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Petitioner,

v.

TRANS WORLD AIRLINES, INC.,
Respondent,

and

ANNE B. ZIPES, PATRICIA A. SANTINI, and PAMELA J. DAILING, individually and on behalf of a class,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, AS AMICUS CURIAE

J. ALBERT WOLL
815 - 15th Street, N.W.
Washington, D.C. 20005

ROBERT M. WEINBERG
MICHAEL H. GOTTESMAN
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

LAURENCE GOLD
815 - 16th Street, N.W.
Washington, D.C. 20006

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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MOTION BY THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO, respectfully moves this Court for leave to file the accompanying brief as *amicus curiae* in support of the position of the petitioner Independent Federation of Flight Attendants.

INTEREST OF THE AMICUS CURIAE AND ISSUES TO BE COVERED IN THE BRIEF AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 104 national and international labor organizations representing approximately 14,750,000 employees throughout the United States.

In this case brought under Title VII of the Civil Rights Act of 1964, the courts below overrode a collective agreement without a determination that the agreement conflicts with a right or remedy established by any federal substantive statute. It is our position that such judicial action contravenes the national labor policy and is not authorized by Title VII. In the accompanying brief *amicus curiae* we canvass the relevant statutory materials and decisions of this Court and demonstrate the correctness of that position.

CONCLUSION

For the above-stated reasons, this motion for leave to file brief *amicus curiae* should be granted.

Respectfully submitted,

J. ALBERT WOLL
815 - 15th Street, N.W.
Washington, D.C. 20005

ROBERT M. WEINBERG
MICHAEL H. GOTTESMAN
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

LAURENCE GOLD
815 - 16th Street, N.W.
Washington, D.C. 20006

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-951

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,
Petitioner,

v.

TRANS WORLD AIRLINES, INC.,
Respondent,

and

ANNE B. ZIPES, PATRICIA A. SANTINI, and PAMELA J. DAILING, individually and on behalf of a class,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the *amicus curiae* in this case is set forth in that motion.

ARGUMENT

The Union and the Company in this case entered into a collective agreement that, *inter alia*, establishes the seniority rules by which employees covered by the agreement compete for scarce job opportunities. Subsequently, on the basis of a settlement agreement between the Company and the plaintiffs, and over the objection of the Union which was a party in the litigation, the district court ordered that the provisions of the collective agreement that define the employees' relative seniority standing [1] are to be overridden as follows:

> [E]ach class member who is now employed as a TWA flight attendant or will hereafter become employed as a flight attendant by TWA under the Settlement Agreement shall be credited with the amount of union * * * seniority to which she was entitled on the date on which her employment was terminated, plus credit for such seniority for the "compensation period," as defined in the Settlement Agreement * * *, less the deductions provided therein * * *, the terms of which are incorporated by reference and are adopted as part of this Order. [Pet. App. 19a].

To make all the more clear that this order would override the collective agreement, the settlement agreement, which the district court adopted and retained jurisdiction to enforce (Pet. App. 17a), specified (Pet. App. 36a-37a):

> Nothing contained in any other agreement or writing and no right or obligation which has arisen or accrued outside of this Settlement Agreement (including prior, current and future labor agreements) shall be deemed to modify, change or diminish the rights and obligations which arise under this Agreement.

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[1] See, *e.g.*, Joint Appendix Vol. II at 90-101.

The order of the district court, which was affirmed by the court of appeals, was not premised on a finding that the collectively bargained seniority provisions are illegal, nor on any finding of a violation of law. Indeed, the settlement agreement recited: "TWA expressely disclaims any liability in these lawsuits and states that it is entering into this Agreement to avoid expenses, inconvenience and the distraction of burdensome and protracted litigation" (Pet. App. 25a); and, at the time the district court entered its order, the court of appeals had already ruled that the claims of the vast majority of those who would secure this extra-contractual seniority credit were time-barred (Pet. App. 40a-58a). The sole predicate for the order was the settlement agreement between the plaintiffs and the Company, to which the Union objected.

In any area of the law, there would be reason to doubt the correctness of the following judicial actions: first, the grant by a trial judge of final relief against a party (here the Union) without that party's consent and without first resolving whether the plaintiff is entitled to that relief as a matter of law or of fact; second, a trial judge's disposing of a suit brought by A against B, concerning a subject also covered in a contract between B and C, by adopting and enforcing a settlement agreement between A and B which denies C the fruits of his bargain without a determination by the judge that the law requires the contract to give way.

The proposition that in such a situation the courts may sanction settlements by which the defendant B transfers C's rights to the plaintiff A contravenes intuitive conceptions of the just and proper functioning of the judicial system. Thus, even putting questions of due process to the side, that untoward result should be indulged only if there is the most compelling evidence that Congress so intended. There is no such evidence here.

Moreover, because in this instance the contract being overridden is a collective agreement, the core premises of the national labor policy independently require that the result reached by the courts below be set aside As we show below, the national labor policy is founded on a system of free collective bargaining in which an employer and the exclusive representative selected by its employees order their relationship without government dictation as to the terms and conditions of employment that emerge from that bargaining. That system precludes negotiation between the employer and factions of employees as to terms and conditions of employment. And, to further the national interest in industrial peace and stability, Congress made it a matter of paramount federal interest that the result of that system, the collective agreement, be enforced as written. A court may enter an order overriding a collective agreement only upon a finding that the agreement conflicts with a right or remedy established by a federal substantive statute, or where both parties to the agreement, by consenting to the entry of the order, have effectively amended the agreement themselves. Neither of those requisites is satisfied here.

1. Three facets of the national labor policy are implicated by the action of the courts below.[2]

First, "[t]he ordering and adjusting of competing interests through a process of free and voluntary collective

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[2] In all respects relevant to the discussion that follows the two basic federal labor relations statutes—the Railway Labor Act (RLA) and the National Labor Relations Act (NLRA) as amended by the Labor Management Relations Act (LMRA)—are perfectly congruent. In developing each of the three basic propositions we make regarding national labor policy, we therefore cite decisions interpreting both the RLA and the NLRA. Although this case involves the RLA, most of the decisions we discuss involve the NLRA, because the NLRA has more often provided the occasions for this Court's articulation of the national labor policy.

bargaining is the keystone of the federal scheme to provide industrial peace." *Teamsters Local v. Lucas Flour Co.*, 369 U.S. 95, 104. The "fundamental premise" of that process, as Congress and this Court have made clear, is "private bargaining under governmental supervision of the procedures, without any official compulsion over the actual terms of the contract." *Porter Co. v. NLRB*, 397 U.S. 99, 108. "And to make crystal clear the intention to leave the parties entirely free of any Government compulsion to agree to a proposal, or even reach an agreement, Congress added § 8(d) [to the NLRA] defining 'to bargain collectively' as 'not [to] compel either party to agree to a proposal or require the making of a concession.'" *Carbon Fuel Co. v. Mine Workers*, 444 U.S. 212, 219. See also to the same effect *Locomotive Engineers v. B. & O. R. Co.*, 372 U.S. 284, 289-290.

Second, where, as here, the employees have chosen an exclusive bargaining representative, the national labor policy prohibits the employer from bargaining with any individual or any faction of employees with respect to wages, hours, and terms and conditions of employment. As this Court explained in *Medo Corp v. Labor Board*, 321 U.S. 678, 683-684:

> The National Labor Relations Act makes it the duty of the employer to bargain collectively with the chosen representatives of his employees. The obligation being exclusive, see § 9(a) of the Act, * * * it exacts "the negative duty to treat with no other." *Labor Board v. Jones & Laughlin Corp.*, 301 U.S. 1, 44; * * *
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> [I]t is a violation of the essential principles of collective bargaining and an infringement of the Act for the employer to disregard the bargaining representative by negotiating with individual employees, whether a majority or a minority, with respect to

> wages, hours and working conditions. * * * *J. I. Case Co. v. Labor Board*, 321 U.S. 332; * * *. [See also to the same effect *Virginian Ry Co. v. System Federation*, 300 U.S. 515, 548-549; *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342; and the Committee Reports on the National Labor Relations Act of 1935: S. Rep. No. 573, 74th Cong., 1st Sess., p. 13; H. Rep. No. 1147, 74th Cong., 1st Sess., p. 20.]

And, in *Emporium Capwell Co. v. Community Org.*, 420 U.S. 50, 69-70, this Court ruled that this prohibition on employer bargaining with employee factions has full application where the subject of the bargaining is how to deal with allegations of discrimination on the basis of race or sex:

> [T]he employees' substantive right to be free of racial [or sexual] discrimination * * * cannot be pursued at the expense of the orderly collective-bargaining process contemplated by the NLRA. The elimination of discrimination and its vestiges is an appropriate subject of bargaining, and an employer may have no objection to incorporating into a collective agreement the substance of his obligation not to discriminate in personnel decisions. * * * But that does not mean that an employer may not have strong and legitimate objections to bargaining on several fronts over the implementation of the right to be free of discrimination for some of the reasons set forth above. Similarly, while a union cannot lawfully bargain for the establishment of continuation of discriminatory practices, * * * it has a legitimate interest in preserving a united front on this as on other issues and in not seeing its strength dissipated and its stature denigrated by subgroups within the unit separately pursuing what they see as separate interests.
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> * * * *
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> The policy of industrial self-determination as expressed in § 7 [of the NLRA] does not require frag-

> mentation of the bargaining unit along racial or other lines in order to consist with the national labor policy against discrimination. And in the face of such fragmentation, whatever its effect on discriminatory practices, the bargaining process that the principle of exclusive representation is meant to lubricate could not endure unhampered.

Third, having established a system of labor relations built on the concept of free collective bargaining, Congress determined that:

> Statutory recognition of the collective agreement as a valid, binding and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace. [S. Rep. No. 105, 80th Cong., 1st Sess., p. 17.]

Thus, in § 301 of the LMRA, and in §§ 3 and 204 of the RLA, Congress established that neither party to a collective agreement may repudiate the commitments made therein and that enforcement of the private bargain as reached is a matter of paramount federal interest. As this Court stated in *Dowd Box Co. v. Courtney*, 368 U.S. 502, 509:

> The Labor Management Relations Act of 1947 represented a far-reaching and many-faceted legislative effort to promote the achievement of industrial peace through encouragement and refinement of the collective bargaining process. It was recognized from the outset that such an effort would be purposeless unless both parties to a collective bargaining agreement could have reasonable assurance that the contract they had negotiated would be honored. Section 301(a) reflects congressional recognition of the vital importance of assuring the enforceability of such agreements. [See also to the same effect *Machinists v. Central Airlines*, 372 U.S. 682, 689-695.]

"The present federal policy is to promote industrial stabilization through the collective bargaining agree-

ment." *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 578.

From the principles just reviewed,

> [i]t follows that the parties' agreement primarily determines their relationship. * * * If the parties' agreement specifically resolves a particular issue, the courts cannot substitute a different resolution. [*Carbon Fuel*, 444 U.S. at 219. See also *Howard Johnson Co. v. Hotel Employees*, 417 U.S. 249, 254-256.]

In this regard the national labor policy strictly limits the power of the courts. The judiciary has no authority to make collective agreements for the parties, nor to substitute agreements between the employer and factions of employees for the collective agreement, nor to remake the collective agreement the parties have made.

2. The system of free collective bargaining just described is, to be sure, limited by the body of federal statutes that directly prescribe certain substantive rules governing employers, employees, and unions. As the *Emporium Capwell* Court put it, "[w]hen union and employer are not responsive to their legal obligations, the bargain they have struck must yield *pro tanto* to the law. * * *" 420 U.S. at 70. "[N]either a collective bargaining contract nor a seniority system may be employed to violate [Title VII] * * *." *Trans World Airlines v. Hardison*, 432 U.S. 63, 79. But, as we have shown, unless a collective agreement is found to conflict with a right or remedy established by a federal substantive statute, that agreement must be enforced as written—a court may not vary the collective agreement's terms or sanction a contrary agreement between the employer and factions of employees.[3]

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[3] A collective agreement does not necessarily give way even when there is an apparent conflict with federal statutory law. Such conflicts are to be resolved in so far as possible by accommodation, worked out in the light of Congressional intent, between

It follows that unless there is a conflict between the collective agreement entered into here by the Company

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the national labor policy and the particular substantive rule. See *Connell Co. v. Plumbers & Steamfitters*, 421 U.S. 616, 622, 636:

> The Court has recognized * * * that a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions.
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> * * * *
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> In this area, the accommodation between federal labor and antitrust policy is delicate. Congress and this Court have carefully tailored the antitrust statutes to avoid conflict with the labor policy favoring lawful employee organization, not only by delineating exemptions from antitrust coverage but also by adjusting the scope of the antitrust remedies themselves. See *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940).

See also, *Mine Workers v. Pennington*, 381 U.S. 657, 665; *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 778; *Tilton v. Missouri Pacific R. Co.*, 376 U.S. 169; *cf., Barrentine v. Arkansas-Best Freight System*, —— U.S. ——, 49 L.W. 4347, 4349 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36.

Where the conflict is between a collective agreement and a state statute, this Court has ruled that the latter must give way. See *Teamsters v. Oliver*, 358 U.S. 283, 296:

> Federal law here created the duty upon the parties to bargain collectively; Congress has provided for a system of federal law applicable to the agreement the parties made in response to that duty, *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448; and federal law sets some outside limits (not contended to be exceeded here) on what their agreement may provide, see *Allen Bradley Co. v. Local Union*, 325 U.S. 797; cf. *United States v. Employing Plasterers Assn.*, 347 U.S. 186, 190. We believe that there is no room in this scheme for the application here of this state policy limiting the solutions that the parties' agreement can provide to the problems of wages and working conditions. Cf. *California v. Taylor*, 353 U.S. 553, 566-567. Since the federal law operates here, in an area where its authority is paramount, to leave the parties free, the inconsistent application of state law is necessarily outside the power of the State. *Hill v. Florida*, 325 U.S. 538, 542-544. Cf. *International Union v. O'Brien*, 339 U.S. 454, 457; *Amalga-*

and the Union and Title VII of the Civil Rights Act of 1964, the courts below did not have the power they asserted to override that agreement in the absence of the consent of *both* contracting parties. But no such conflict has been shown to exist.

No violation of Title VII has been found by the lower courts. There is only plaintiffs' *allegation* of such a violation. In the settlement agreement, the Company "expressly disclaims any liability in these lawsuits * * *." Pet. App. 25a. And, the only court ruling on the validity of plaintiffs' allegation is the holding of the court of appeals that the Title VII claims of the vast majority of those in the plaintiff class—all of whom under the court order at issue would be granted extra-contractual seniority—are time-barred. Pet. App. 40a-58a.

Nor does Title VII authorize the courts to set aside collective agreements as inferior to settlement agreements between plaintiffs and employers. In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79, this Court stated:

> Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts. Without a clear and express indication from Congress, we cannot agree * * * that an agreed-upon seniority system must give way * * *.

We have found, and the courts below have cited, nothing, much less "a clear and express indication," in the language or history of Title VII to suggest that Congress

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mated Assn. v. Wisconsin Employment Relations Board, 340 U.S. 383; *Plankinton Packing Co. v. Wisconsin Employment Relations Board*, 338 U.S. 953. The solution worked out by the parties was not one of a sort which Congress has indicated may be left to prohibition by the several States.

See also, *Connell Co.*, 421 U.S. at 637.

meant to empower the courts to override collective agreements on the basis of settlement agreements between plaintiffs and employers. Title VII in terms simply authorizes a court to provide a remedy "*if the court finds*" a violation of the statute. § 706(g) (emphasis added). That grant of remedial power includes the authority to provide extra-contractual seniority credits, such as those ordered here, on the finding of a violation. *Franks v. Bowman Transportation Co.*, 424 U.S. 747. Plainly § 706(g) is not a grant of authority to act in the absence of such a finding. To be sure, courts have unquestioned authority to issue orders providing such credits where *all* parties with an interest in the litigation, including *both* signatories to the collective agreement, agree to the entry of the order.[4]

But, against the background of the national labor policy, it does not follow that solely on the basis of settlement agreements between plaintiffs and employers, or plaintiffs and unions, courts may direct that collective agreements be overridden in the face of an objection from the other party to the collective agreement. This Court's decisions establish that under the national labor policy it is the collective agreement that takes precedence. And this Court has never reversed that order of priority where it is alleged *but not proved* that the collective agreement contravenes another federal statute. Congress cannot be assumed to have thought otherwise in enacting Title VII. And there is not a single word in the legislative history expressing such an understanding or manifesting an intent to subordinate collective agreements to settlement agreements. Indeed, a ma-

[4] At least in certain circumstances, Title VII permits the parties to collective agreements to modify seniority provisions, for example, to provide "rightful place" seniority relief to victims of discrimination whose claims under Title VII are time-barred. *Franks, supra*, 424 U.S. at 778-779; see also *Steelworkers v. Weber*, 443 U.S. 193.

jor theme stated in those legislative deliberations is Congress' intent to *minimize* the intrusion Title VII would work on free collective bargaining. As this Court pointed out in *California Brewers Assn. v. Bryant*, 444 U.S. 598, 608 (footnote omitted):

> Congress passed the Civil Rights Act of 1964 against the backdrop of this Nation's longstanding labor policy of leaving to the chosen representatives of employers and employees the freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment. See generally *Steelworkers v. Weber*, 443 U.S. 193. It does not behoove a court to second-guess either that process or its products. *Porter Co. v. NLRB*, 397 U.S. 99.

In short, in enacting Title VII Congress did not go to the extreme of abandoning the core concepts of the national labor policy in order to allow employers and employees involved in a Title VII suit to end that case by agreeing to override a collective agreement despite the signatory union's objection. The courts below erred in directing that the collective agreement be overridden solely on the basis of an agreement between the Company and the plaintiffs.

3. In *Teamsters v. United States*, 431 U.S. 324, this Court gave implicit recognition to the analysis set forth above. In that case, the Court having held that the seniority system under challenge did not violate Title VII, there remained only claims of assignment discrimination against the employer. Under *Franks* those claims if proved could lead to relief providing extra-contractual seniority credits. Thus, with respect to those claims, the interests of the union in that case, as in the instant case, were implicated only to the extent that claimants who proved their case would be entitled to an award of retroactive seniority. In that context, the Court ruled (431 U.S. at 356, n. 43):

> The union will properly remain in this litigation as a defendant so that full relief may be awarded the victims of the employer's post-Act discrimination. Fed. Rule Civ. Proc. 19(a). See *EEOC v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1095 (CA 6).

At the page cited, *MacMillan Bloedel* states (footnote omitted):

> The Union was joined as a party defendant under Rule 19(a), Fed.R.Civ.P., "because the decree entered by the court may affect, in some way, its collective bargaining agreement" with MacMillan. The Union is not charged with a Title VII violation and no relief is sought against it.
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> We believe that the EEOC followed the proper course when it joined the Union under Rule 19(a), Fed.R.Civ.P. This provides the Union with a full opportunity to participate in the litigation and the formulation of proposed relief against MacMillan. • • • Such an opportunity will allow the Union to protect adequately the interests of its members, will provide the discriminatee with full and complete relief and will also insure that the suit is handled at one time and in one forum. This procedure is fully consistent with Title VII's emphasis on judicial expediency. See 42 U.S.C. § 2000e-5(f)(4) and (5).

According the union a "full opportunity to participate in the litigation" necessarily includes the opportunity to put the plaintiffs to their proof as a precondition to an order that would override the collective agreement. Otherwise, either the union would be deprived of an opportunity "to protect adequately" its contract right or the relief ordered by the court would be subject to collateral attack in an action by the union on the contract. In either event, one or more of the premises for joining the union as a Rule 19(a) party—to "allow the Union to

protect adequately the interests of its members, * * * provide the discriminatee with full and complete relief and * * * also insure that the suit is handled at one time and in one forum"—would be defeated.

4. Title VII evinces a Congressional preference for the voluntary resolution of claims of discrimination. The Act provides a means for the conciliation of disputes (see § 706(b)), and establishes a system of remedies designed to act as a "spur or catalyst which causes employers and unions * * * to endeavor to eliminate" discriminatory practices (*Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-418). The analysis to this point is perfectly consistent with those policies. Conciliation is a voluntary process, not a basis for court-ordered compulsion. And, while the courts' remedial powers are Congress' chosen means for enforcing compliance, the legislature did not grant the courts the authority to award remedies where *no* violation is proved. As a practical matter, that limitation hardly eliminates the incentive or the opportunity for self-correction.

An employer who believes that a provision of his collective agreement violates Title VII has the option of not honoring that provision. An unlawful contractual provision is not enforceable, and the employer response to a union § 301 action for breach of the agreement would be the defense of illegality. The union would prevail only if the agreement were found not to violate Title VII.

Alternatively, an employer who believes a contract provision unlawful could propose to the union that the provision be amended. If the union refused, the employer would be in a position to contend in any ensuing Title VII action brought by employees that if the contract is found unlawful, the union, by its resistance, "cause[d] the employer to discriminate," thus violating § 703(c)(3), and that the court should exercise its discretion to

apportion all of the backpay attributable to the unlawful contract against the union for the period following the union's refusal to amend the contract. See *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641, 655-656 (CA 5, 1974). In this manner, the "prophylactic" remedial objective of Title VII (*Albemarle Paper Co.*, 422 U.S. at 417) would be served: the potential for suffering the entire backpay responsibility acts as a "spur or catalyst" to induce self-correction on the part of the union (*id.*).

Where it is the union, rather than the employer, that believes a contractual provision unlawful, the latter but not the former of those two alternatives is available. *Johnson v. Ryder Truck Lines, Inc.*, 555 F.2d 1181, 1182 (CA 4, 1977), affirming 12 FEP Cases 895, 903, 904, 914 (WDNC 1975); *Terrell v. U.S. Pipe Foundry Co.*, 644 F.2d 1112, 1120-21 (CA 5, 1981). (As the union does not operate the plant, it does not have the capacity to effect a unilateral departure from the contractual terms. *Steelworkers v. Warrior & Gulf Corp.*, 363 U.S. 574, 583.)

The foregoing principles are equally applicable where, as here, the collective agreement is not unlawful *per se*, but rather is inconsistent with remedial relief that would be warranted if a Title VII violation occurred. If either party to the agreement believes that there were Title VII violations requiring such relief, the options described above would be available.

CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed.

Respectfully submitted,

J. ALBERT WOLL
815 - 15th Street, N.W.
Washington, D.C. 20005

ROBERT M. WEINBERG
MICHAEL H. GOTTESMAN
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

LAURENCE GOLD
815 - 16th Street, N.W.
Washington, D.C. 20006